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THE LAW OF  
HUSBAND AND WIFE.



THE LAW

OF

HUSBAND AND WIFE.

AS ESTABLISHED IN

ENGLAND AND THE UNITED STATES.

BY

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## PREFACE.

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THIS volume and that of the author on "Marriage and Divorce" are intended to cover together the whole subject of marriage and marriage rights. Of the relation of parent and child, owing to its having its source in marriage, more would have been said had the mass of law relating to the main subject proved less formidable.

Marriage rights have wonderfully changed during the past twenty-five years, and in no two States have the changes been precisely the same. Yet it is possible, from the authorities, to formulate rules sufficiently general to be of great assistance everywhere, and it has been the author's object to give such rules rather than the law exactly as it exists in any particular State.

Discussions of disputed questions have been, as far as possible, avoided, a bare statement of the points made on the different sides, with the authorities, being given. As may be seen from the mode of citation, the cases have been personally examined by the author. Rarely, however, are the words of the judges quoted, it being deemed better to state results in the simplest and least technical language. Loose expressions on the part of judges have done as much to confuse this complicated subject as loose legislation. Indeed, words have been used most recklessly: for example, in the statutes of Illinois, a widower's estate

667315

in his wife's realty is called "dower"; and untold confusion has resulted from a failure, in speaking of married women's "separate" property, to bear in mind the distinction between "equitable" and "statutory" separate property. Nothing could be more anomalous than the condition of the law of husband and wife in Maryland, Pennsylvania, and most of the older States. Great superiority, in this respect, is noticeable in the laws of many of the Middle and Western States, which have been ably and intelligently revised or codified.

Analysis, in a law book, is second in importance to nothing; and, however faulty the analysis adopted by the author may be, it has been, in the treatment of the subject, rigidly adhered to. Logic, however, like everything else, fails to carry one safely through the intricacies of the law of husband and wife. In the introductory chapter, the divisions of the work are given and explained. Certain chapters, such as that on Homestead Property, belong only indirectly to the subject, and are not exhaustively treated. Every pains has been taken, however—even a little repetition has been deemed permissible—to enable the busy lawyer to find quickly any point that is treated at all in this book.

DAVID STEWART.

BALTIMORE, June 12, 1885.

# CONTENTS.

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## PART I. — INTRODUCTORY.

### CHAPTER I.

#### THE SUBJECT DEFINED AND DIVIDED.

- § 1. Husband, wife, children, the married state.
- § 2. The relation of husband and wife.
- § 3. The estates of husband and wife.
- § 4. The status of married woman.
- § 5. The relation of parent and child.

### CHAPTER II.

#### SOURCES, INTERPRETATION, AND CONFLICTS.

##### ARTICLE I. — SOURCES OF THE LAW.

- § 6. The common law and English statutes.
- § 7. The civil law and codes.
- § 8. The equity system.
- § 9. Statutes.
- § 10. The resulting questions.

##### ARTICLE II. — INTERPRETATION OF THE LAW.

- § 11. Interpretation in general.
- § 12. Rules of interpretation.
- § 13. General statutes do not affect husband and wife.
- § 14. Married women acts do not affect marriage relation.
- § 15. Property acts do not affect personal status.
- § 16. Strict and liberal interpretation.
- § 17. Prospective interpretation.
- § 18. Local interpretation.

## ARTICLE III.—PAST AND PRESENT LAW.

- { 19. Prospective and retrospective statutes.
- { 20. All statutes *prima facie* prospective.
- { 21. Retrospective statutes, validity of.
- { 22. Retrospective statutes, vested rights.
- { 23. Retrospective statutes, curative acts.

## ARTICLE IV.—HOME AND FOREIGN LAW.

- { 24. Foreign law recognized by courts.
- { 25. Foreign law must be proved.
- { 26. Nature of conflict of laws.
- { 27. Story's rules.
- { 28. Effect of marriage settlement.
- { 29. Matrimonial domicile defined.
- { 30. *Lex maritima*—matrim.
- { 31. *Lex maritima*—property.
- { 32. Effect of change of domicile.
- { 33. *Lex rei sitæ*—immovables.
- { 34. *Lex loci actus*—validity of acts.
- { 35. *Lex fori*—immovables.
- { 36. Will of married woman.
- { 37. Contracts of married woman.

## PART II.—THE RELATION OF HUSBAND AND WIFE.

## CHAPTER III.

## THE UNITY OF HUSBAND AND WIFE.

## ARTICLE I.—THE FICTION OF UNITY.

- { 38. Defined and explained.
- { 39. Miscellaneous remarks.

## ARTICLE II.—CONTRACTS BETWEEN HUSBAND AND WIFE.

- { 40. Causes affecting validity of.
- { 41. At common law.
- { 42. In equity.
- { 43. Under statutes.



- § 44. Antenuptial.
- § 45. Husband and wife as debtor and creditor.
- § 46. Recent decisions.

### ART. III.—WRONGS BETWEEN HUSBAND AND WIFE.

- § 47. Classified.
- § 48. Civil wrongs.
- § 49. Criminal wrongs.

### ARTICLE IV.—WILLS BETWEEN HUSBAND AND WIFE.

- § 50. Effect of, generally.
- § 51. Miscellaneous points as to.

### ARTICLE V.—SUITS BETWEEN HUSBAND AND WIFE.

- § 52. Scope of this article.
- § 53. Suits under unwritten law.
- § 54. Suits under statutes.
- § 55. Suits after dissolution of marriage.
- § 55 a. Defences to suits.
- § 56. Testimony of husband or wife.

## CHAPTER IV.

### CONJUGAL RIGHTS AND OBLIGATIONS.

#### ARTICLE I.—THE SEVERAL CONJUGAL RIGHTS AND OBLIGATIONS.

- § 57. Conjugal rights and obligations defined.
- § 58. Right of love, honor, etc.
- § 59. Right of matrimonial cohabitation and intercourse.
- § 60. Right to fix family home, and regulate household.
- § 61. Right to use family name.
- § 62. Right of personal custody and restraint.
- § 63. Right of personal chastisement.
- § 64. Right of support.
- § 65. Right to personal services.
- § 66. Liability in tort.
- § 67. Liability in contract.
- § 68. Liability in crime.

- { 69. Other personal rights and liabilities.
- { 70. Property rights and liabilities.
- { 71. Rights and obligations as to children.

## ART. II.—ACTIONS ARISING FROM CONJUGAL RIGHTS AND OBLIGATIONS.

- { 72. Suits for restitution of conjugal rights.
- { 73. Suits for divorce.
- { 74. Suits for nullity of marriage.
- { 75. Writs of habeas corpus, &c.
- { 76. Suits of wife in which husband is joined, &c.
- { 77. Suits for wrongs to spouse.
- { 78. Suits for enticement or harboring.
- { 79. Suits for criminal conversation.
- { 80. Suits for civil adultery, &c.
- { 81. Suits for non-support.

## CHAPTER V.

### CONJUGAL AGENCY.

## ARTICLE I.—AGENCY BETWEEN HUSBAND AND WIFE IN GENERAL.

- { 82. In law and in fact.
- { 83. Division of the subject.

## ARTICLE II.—AGENCY OF HUSBAND FOR WIFE.

- { 84. Appointment of husband.
- { 85. Scope of authority of husband.
- { 86. Proof of limited agency in fact.
- { 87. Compensation of husband.
- { 88. Special husband and illustrations.

## ARTICLE III.—AGENCY OF WIFE FOR HUSBAND.

- { 89. Appointment of wife.
- { 90. Wife's agency arising out of husband's absence, &c.
- { 91. Illustrations of wife's want of authority.
- { 92. Scope of wife's authority.
- { 93. Wife as husband's agent in business.

- { 94. Wife as husband's agent in household.
- { 95. Wife as husband's agent for necessaries.
- { 96. Authorities as to necessaries.
- { 97. Proof of wife's agency for husband.
- { 98. Determination of wife's agency for husband.

## CHAPTER VI.

### POSTNUPTIAL SETTLEMENTS — DEALINGS.

#### ARTICLE I.—POSTNUPTIAL SETTLEMENTS IN GENERAL.

- { 99. Term "postnuptial settlement" defined.
- { 100. Valid, void, and voidable settlements.
- { 101. On what validity depends.

#### ARTICLE II.—FORM OF POSTNUPTIAL SETTLEMENTS.

- { 102. When formalities are necessary.
- { 103. Various forms of settlements.

#### ARTICLE III.—CONSIDERATION IN POSTNUPTIAL SETTLEMENTS.

- { 104. Necessity of consideration.
- { 105. Kinds of consideration.
- { 106. Adequacy of consideration.
- { 107. Effect of consideration.
- { 108. Miscellaneous points as to consideration.

#### ARTICLE IV.—FRAUD IN POSTNUPTIAL SETTLEMENTS.

- { 109. Fraud in law and in fact.
- { 110. Fraud between the parties.
- { 111. Fraud against creditors.
- { 112. Evidence of fraud.

#### ARTICLE V.—RIGHTS OF CREDITORS.

- { 113. Fraudulent conveyances defined.
- { 114. Statutes protecting creditors.
- { 115. Who are protected as creditors.
- { 116. Rights of existing creditors.
- { 117. Rights of subsequent creditors.
- { 118. Property exempt from creditor's rights.

## ARTICLE VI.—POSSESSION OF HUSBAND AND WIFE.

- { 118 a. Possession of husband and wife generally.
- { 119. Prohibitions from.
- { 120. Changes of, as delivery.
- { 121. Reversion of, as fraud.

## ARTICLE VII.—REMEDIES RESPECTING POSTNUPTIAL SETTLEMENTS.

- { 122. In general.
- { 123. Of partition, &c.
- { 124. Of creditors.

## ARTICLE VIII.—PARTICULAR KINDS OF SETTLEMENTS.

- { 125. DOWRY.
- { 126. Testamentary settlements.
- { 127. Powers of life or annuity.
- { 128. Joint settlements.
- { 129. Mortgage of property.
- { 130. Servitudes and uses.
- { 131. Improvements on real estate.
- { 132. Limiting trusts.
- { 133. Life insurance policies.
- { 134. Secret trusts.

## PART III.—ESTATES OF HUSBAND AND WIFE.

## CHAPTER VII.

## ESTATES OF HUSBAND AND WIFE, IN GENERAL.

- { 135. Term "estate," how used.
- { 136. Estates by grant and partition.
- { 137. General effect of marriage on property rights.
- { 138. General effect of death or divorce.
- { 139. Estates divided and consolidated.

## CHAPTER VIII.

## HUSBAND'S ESTATE IN HIS OWN PROPERTY.

- { 140. A husband's estate, how limited by marriage.

## CHAPTER IX.

## HUSBAND'S ESTATES IN WIFE'S REALTY.

- { 141. Under common law, settlements, and statutes.
- { 142. During coverture, and after death or divorce.
- { 143. In wife's estates of inheritance.
- { 144. In wife's life estates.
- { 145. In wife's chattels real.

ART. II.—HUSBAND'S ESTATE DURING COVERTURE  
JURE UXORIS.

- { 146. Husband's estate during coverture defined.
- { 147. Incidents of the estate.
- { 148. Wife's estates which are subject to this estate.
- { 149. Effect of settlements on this estate.
- { 150. Effect of statutes on this estate.

## ARTICLE III.—CURTESY.

- { 151. Definitions of curtesy.
- { 152. Common-law requisites of curtesy.
- { 153. Marriage necessary to give curtesy.
- { 154. Birth of issue necessary to give curtesy.
- { 155. Seln of wife necessary to give curtesy.
- { 156. Death of wife necessary to give curtesy.
- { 157. Property in which curtesy exists.
- { 158. Incidents of estate of curtesy.
- { 159. Barring and defeating of curtesy.
- { 160. Curtesy under statutes, generally.
- { 161. Effect of married women acts on curtesy.
- { 162. Retrospective effect of statutes.

## CHAPTER X.

## HUSBAND'S ESTATES IN WIFE'S PERSONALTY.

ART. I.—HUSBAND'S ESTATE IN WIFE'S PERSONALTY  
IN GENERAL.

- { 163. At common law.
- { 164. In equity.
- { 165. Under statutes.

H. &amp; W.—a.

## ARTICLE II. — PERSONALTY IN POSSESSION.

- { 166. Defined.
- { 167. Possession by wife.
- { 168. Possession by husband.
- { 169. Possession by third person.
- { 170. Husband's rights in.

## ARTICLE III. — CHOSSES IN ACTION.

- { 171. Defined.
- { 172. Chattels out of possession.
- { 173. Bonds, stock, notes, etc.
- { 174. Legacies, distributive shares, etc.
- { 175. Remainders, possibilities, etc.
- { 176. Husband's rights in.

## ARTICLE IV. — REDUCTION TO POSSESSION.

- { 177. How far a personal right.
- { 178. The intention and the act.
- { 179. Getting possession or receiving payment.
- { 180. Substitution.
- { 181. Assignment.
- { 182. Release.
- { 183. Suit.

## CHAPTER XI.

## WIFE'S ESTATE IN HER OWN PROPERTY.

## ARTICLE I. — GENERALLY.

- { 184. Wife's general property.
- { 185. Wife's separate property.

## ARTICLE II. — PARAPHERNALIA AND PIN-MONEY.

- { 186. Paraphernalia defined.
- { 187. Incidents of paraphernalia.
- { 188. Pin-money defined.
- { 189. Incidents of pin-money.

## ARTICLE III.—WIFE'S EQUITY TO A SETTLEMENT.

- { 190. Definition.
- { 191. By what court enforced.
- { 192. On whose application enforced.
- { 193. Out of what property enforced.
- { 194. Under what circumstances enforced.
- { 195. On whom the settlement is made.
- { 196. Amount of the settlement.

## CHAPTER XII.

## WIFE'S EQUITABLE SEPARATE ESTATE.

- { 197. Defined.
- { 198. Creation of.
- { 199. Settlor's intent to exclude husband.
- { 200. Words which show such intent.
- { 201. Present and future husbands.
- { 202. Necessity of trustee—Husband as trustee.
- { 203. Wife's control over.
- { 204. Restraints on alienation and anticipation.
- { 205. Wife's power to dispose of *inter vivos*.
- { 206. Wife's power to contract concerning—Rules.
- { 207. Wife's power to contract concerning—Decisions.
- { 208. Wife's power to will.
- { 209. Wife's rights in increase—Rents, profits, etc.
- { 210. Remedies of wife concerning.
- { 211. Remedies against.
- { 212. Rights of husband and his creditors over.
- { 213. How lost or extinguished.
- { 214. Effect of death upon.
- { 215. Effect of divorce upon.
- { 216. Effect of modern statutes upon.

## CHAPTER XIII.

## WIFE'S STATUTORY SEPARATE ESTATE.

ART. I.—WIFE'S STATUTORY SEPARATE ESTATE IN  
GENERAL.

- { 217. Statutory separate estate defined.
- { 218. The statutes described.
- { 219. "Property," "personal rights," etc., defined.

## ART. II.—SOURCES OF STATUTORY SEPARATE PROPERTY.

- { 20. Modes of acquisition, generally.
- { 21. Owned at time of marriage.
- { 22. Acquired in any manner.
- { 23. Acquired by purchase.
- { 24. Acquired by gift or grant.
- { 25. Acquired by devise, bequest, descent, distribution.
- { 26. Acquired by exchange.
- { 27. Acquired by income.
- { 28. Acquired by services or trade.
- { 29. Acquired by contract.
- { 30. Acquired by tort.
- { 31. Acquired jointly with husband.

## ARTICLE III.—INCIDENTS OF STATUTORY SEPARATE PROPERTY.

- { 32. Necessity of inventory—Proof of title.
- { 33. Wife's power and control over, generally.
- { 34. Powers incidental to ownership, etc.
- { 35. Jurisdiction of equity—Trustee, etc.
- { 36. Wife's disposition of.
- { 37. Wife's contracts concerning.
- { 38. Wife's contracts as equitable charges upon.
- { 39. Wife's contracts under statutory authority.
- { 40. Wife's wills of.
- { 41. Wife's remedies concerning.
- { 42. Liabilities of.
- { 43. Rights of husband and his creditors to.

## CHAPTER XIV.

## WIFE'S ESTATE IN HUSBAND'S REALTY—DOWER.

## ARTICLE I.—NATURE AND INCIDENTS OF DOWER.

- { 44. Meaning of the word "dower."
- { 45. Origin and history of dower.
- { 46. Dower at common law defined.
- { 47. Dower under the statutes.
- { 48. Conflict of laws as to dower.



- { 240. Requisites of dower.
- { 250. Marriage as a requisite of dower.
- { 251. Husband's death as a requisite of dower.
- { 252. Husband's solida as a requisite of dower.
- { 253. Kinds of property subject to dower.
- { 254. Kinds of estates subject to dower.
- { 255. Dos de dote peti non debet.
- { 256. Dower in equitable estates.
- { 257. Dower in partnership estates.
- { 258. Dower and other encumbrances — Priorities.
- { 259. Dower and purchase money.
- { 260. Dower in mortgaged property — How it exists.
- { 261. Dower in mortgaged property — Redemption and foreclosure.
- { 262. Dower before husband's death — Inchoate dower.
- { 263. Dower before assignment.
- { 264. Assigned dower — Incidents of.

## ARTICLE II. — BARRING AND DEFEATING OF DOWER.

- { 265. Generally, various modes of.
- { 266. Antenuptial settlement or agreement.
- { 267. Postnuptial settlement or agreement.
- { 268. Act of husband before and during coverture.
- { 269. Act of wife during coverture.
- { 270. Release of dower, generally.
- { 271. Release of dower, parties, consideration.
- { 272. Release of dower, effect of.
- { 273. Jointure, legal and equitable.
- { 274. Devise in lieu of dower.
- { 275. Widow's election.
- { 276. Estoppel.
- { 277. Limitations and laches.
- { 278. Dedication to public uses.
- { 279. Termination of husband's estate, etc.
- { 280. Legal proceedings.
- { 281. Divorce.
- { 282. Bankruptcy of husband.

## ARTICLE III. — ASSIGNMENT OF DOWER.

- { 283. The widow's right to an assignment.
- { 284. Who must assign.
- { 285. Assignment without suit — Of and against common right.
- { 286. Assignment by suit — At common law.

- { 287. Assignment by suit—At law under statutes.
- { 288. Assignment by suit—In equity.
- { 289. Proof of right to dower.
- { 290. Estoppels against defendant.
- { 291. Widow's right to dower in mansion house.
- { 292. Assignment by notes and bonds.
- { 293. Assignment in rents and profits.
- { 294. Assignment in gross sum.
- { 295. Widow's right in improvements.
- { 296. Widow's right to dower in equity.
- { 297. Widow's right to account of mesne profits in equity.
- { 298. Effect of assignment.
- { 299. Effect of extensive assignment.
- { 300. Effect of eviction from assigned lands.

## CHAPTER XV.

### WIFE'S ESTATE IN HUSBAND'S PERSONALTY.

- { 301. Generally.

## CHAPTER XVI.

### ESTATES OF HUSBAND AND WIFE IN PROPERTY OF BOTH OF THEM.

- { 302. Property owned by both before marriage.
- { 303. Property vesting in them after marriage.
- { 304. Tenancy by the entirety at common law—Creation of.
- { 305. Tenancy by the entirety at common law—Property subject to.
- { 306. Tenancy by the entirety at common law—Incidents of.
- { 307. Effect of statutes referring to joint estates.
- { 308. Effect of married women's separate property acts.
- { 309. Effect of divorce.
- { 310. Joint and common estates of husband and wife.
- { 311. Personal property belonging to both.

## CHAPTER XVII.

### COMMUNITY PROPERTY.

- { 312. Characteristics, origin, and history of community system.
- { 313. Statutes relating to community property.

- ‡ 314. What is and is not community property.
- ‡ 315. Rights of husband during coverture over.
- ‡ 316. Rights of wife during coverture over.
- ‡ 317. Rights of creditors of husband and wife over.
- ‡ 318. Disposition of, on divorce or death.
- ‡ 319. Conflict of laws as to.

## CHAPTER XVIII.

### HOMESTEAD PROPERTY.

- ‡ 320. Purpose and policy of homestead and exemption laws.
- ‡ 321. Construction of homestead laws.
- ‡ 322. The party entitled to a homestead.
- ‡ 323. The homestead defined.
- ‡ 324. In what estates the homestead may exist.
- ‡ 325. How the homestead is obtained.
- ‡ 326. How the homestead may be lost.
- ‡ 327. Nature of the homestead estate, and incidents.
- ‡ 328. Rights of husband in and over the homestead.
- ‡ 329. Rights of wife in and over the homestead.
- ‡ 330. Liabilities of the homestead to claims of creditors.

## PART IV.—THE STATUS OF MARRIED WOMEN.

### CHAPTER XIX.

#### THE STATUS OF MARRIED WOMEN, GENERALLY.

- ‡ 331. General rule at common law, no legal existence.
- ‡ 332. Capacities of wife abandoned by husband.
- ‡ 333. Capacities of wife divorced *a mensa et thoro*.
- ‡ 334. Capacities of wife of husband civilly dead.
- ‡ 335. Capacities of wife of husband not *sui juris*.
- ‡ 336. Capacities of wife acting in representative position.
- ‡ 337. Capacities of wife in equity.
- ‡ 338. Capacities of wife under statutes.
- ‡ 339. Effect of additional disability of infancy, etc.

## CHAPTER XX.

## WILLS OF MARRIED WOMEN.

- { 341. Testamentary law as applied to married women.
- { 341. Wills of married women at common law, generally.
- { 342. Wills of married women at common law, exceptions.
- { 343. Wills of married women in equity.
- { 344. Wills of equitable separate property.
- { 345. Wills of married women under statutes.
- { 346. Wills of statutory separate property.
- { 347. Validity and operation of wills distinguished.
- { 348. Effect of husband's consent to wife's will.
- { 349. Mutual wills of husband and wife.
- { 350. Gifts *inter vivos* of married women.
- { 351. Revocation of will by married women.
- { 352. Wills made by women before her marriage.
- { 353. Wills republished after dissolution of marriage.
- { 354. Conflict of laws as to wills.

## CHAPTER XXI.

## CONTRACTS OF MARRIED WOMEN.

## ARTICLE I. — THE GENERAL PRINCIPLES.

- { 355. The word "contract" defined and explained.
- { 356. Law of contracts as affected by coverture.
- { 357. Contracts of married women at common law, generally.
- { 358. Contracts of married women at common law, exceptions.
- { 359. Contracts of married women in equity.
- { 360. Contracts charging equitable separate property.
- { 361. Contracts of married women under statutes.
- { 362. Contracts charging statutory separate property.
- { 363. Contracts of married women as agents.
- { 364. Contracts of married women through agents.
- { 365. Contracts of married women made before marriage.
- { 366. Contracts of married women confirmed after coverture.
- { 367. Contracts between husband and wife.
- { 368. Invalid contracts, whether void or voidable.

## ARTICLE II.—THE STATUTES CONSTRUED—THEIR EFFECT.

- § 369. General statutes not referring to married women.
- § 370. Married women's separate property acts, generally.
- § 371. Property acts — Contracts in equity.
- § 372. Property acts — Contracts by implication.
- § 373. Property acts — Contracts under express powers.
- § 374. Statutes expressly authorizing or prohibiting.
- § 375. Statutes expressly authorizing all contracts.
- § 376. Statutes requiring formalities.
- § 377. Local and extra territorial effect.
- § 378. Prospective and retrospective effect.
- § 378 a. The statutes in the different States.

## ARTICLE III.—SPECIAL KINDS OF CONTRACTS.

- § 379. Contracts *in personam* and *in rem*.
- § 380. Executory and executed contracts.
- § 381. Express and implied contracts.
- § 382. Contracts made alone and jointly with husband.
- § 383. Purchases and sales.
- § 384. Covenants and bonds.
- § 385. Promissory notes.
- § 386. Releases and receipts.
- § 387. Rent, repairs, and family expenses.
- § 388. Submission to arbitration.
- § 389. Employment of agents.
- § 390. Liabilities as stockholder.
- § 391. Contracts as surety.
- § 392. Contracts as trader.
- § 393. Miscellaneous contracts, etc.

## CHAPTER XXII.

## DEEDS OF MARRIED WOMEN.

- § 394. At common law.
- § 395. Under statutes.
- § 396. Of dower.
- § 397. Of equitable separate property.
- § 398. Of statutory separate property.
- § 399. Joinder of husband.

- { 40. Execution by wife.
- { 41. Certificate of acknowledgment, etc.
- { 42. Confirmation of invalid deed by wife.
- { 43. Confirmation of invalid deed by statute.
- { 44. Confirmation of invalid deed by equity.
- { 45. Impeachment of married women's deeds.
- { 46. Married woman's powers of attorney.
- { 47. Agreements of married women to give deeds.
- { 48. Miscellaneous points as to deeds of married women.

## CHAPTER XXIII.

## ESTOPPELS AGAINST MARRIED WOMEN.

- { 49. Estoppels divided.
- { 50. Estoppels against married women — General rules.
- { 51. Estoppels by record against married women.
- { 52. Estoppels by deed against married women.
- { 53. Estoppels *in pais* defined.
- { 54. Estoppels *in pais* against married women — General rules.
- { 55. Estoppels *in pais* — Contracts.
- { 56. Estoppels *in pais* — False representations.
- { 57. Estoppels *in pais* — Silence, acquiescence.
- { 58. Estoppels *in pais* — Pure torts.
- { 59. Effect of participation of husband.
- { 60. Estoppels after dissolution of marriage.

## CHAPTER XXIV.

## TORTS OF MARRIED WOMEN.

- { 61. General considerations.
- { 62. Attempted torts.
- { 63. Instigated torts.
- { 64. Torts connected with contract.
- { 65. Liability for, how enforced.

## CHAPTER XXV.

## CRIMES OF MARRIED WOMEN.

- { 66. Married women's liability for crime.
- { 67. Proof of married women's guilt.

## CHAPTER XXVI.

## SUITS OF MARRIED WOMEN.

## ART. I.—SUITS OF MARRIED WOMEN, IN GENERAL.

- { 428. Preliminary notes.
- { 429. Rights and remedies distinguished.
- { 430. Effect of marriage on pending suits.
- { 431. Suits of married women at common law.
- { 432. Suits of married women in equity and by statute.
- { 433. Suits between husband and wife.
- { 434. Effect of dissolution of marriage on pending suits.
- { 435. Law of forum governs remedies.
- { 436. Law of time suit brought governs remedies.
- { 437. Costs.

## ARTICLE II.—SUITS BY MARRIED WOMEN.

- { 438. Modes in which married women may sue.
- { 439. Suits jointly with husband.
- { 440. Suits by trustee or next friend.
- { 441. Suits by married women alone.
- { 442. The causes of action.
- { 443. The defenses.
- { 444. Plea of coverture against married women.
- { 445. Plea of limitations against married women.
- { 446. Special proceedings of married women.
- { 447. The ownership of the proceeds of suit.

## ARTICLE III.—SUITS AGAINST MARRIED WOMEN.

- { 448. Modes in which married women may be sued.
- { 449. Suits jointly with husband.
- { 450. Suits with trustee or next friend.
- { 451. Suits against married women alone.
- { 452. The service of process.
- { 453. The causes of action.
- { 454. The defenses.
- { 455. The plea of coverture by married women.
- { 456. The plea of limitations by married women.
- { 457. Effect of judgment against married women.
- { 458. Execution, etc., of the judgment.
- { 459. Special proceedings against married women.

## ARTICLE IV.—MANAGEMENT OF SUITS.

- { 40. The powers of the husband over the suit
- { 41. The wife's separate suit, defence, &c.
- { 42. Married women's appointment of attorneys at law.
- { 43. Compensation of married women's attorneys.

## CHAPTER XXVII.

## MARRIED WOMEN TRADERS.

## ARTICLE I.—SOURCES OF CAPACITY TO TRADE.

- { 44. Sources of capacity to trade generally.
- { 45. Definition.—our rights, "1840," &c.
- { 46. Capacity when husband is civilly dead, &c.
- { 47. Capacity by custom.
- { 48. Capacity in equity.
- { 49. Capacity by husband's consent.
- { 50. Capacity under statutes—Separate property acts.
- { 51. Capacity under statutes—Other acts.
- { 52. Capacity under statutes—Special requirements.

## ARTICLE II.—INCIDENTS OF CAPACITY TO TRADE.

- { 53. How far dependent on sources of capacity.
- { 54. Express powers under statutes.
- { 55. Implied powers under statutes.
- { 56. Rights of wife's creditors.
- { 57. Rights of husband's creditors.
- { 58. Rights and liabilities of husband.
- { 59. Married women as agents by trade.
- { 60. Married women as partners.
- { 61. Married women as incorporators, stockholders, &c.

## CHAPTER XXVIII.

## MARRIED WOMEN IN REPRESENTATIVE CAPACITIES.

- { 62. The questions involved.
- { 63. Some general rules.
- { 64. Married women as agents.
- { 65. Married women as trustees.
- { 66. Married women as executors, &c.
- { 67. Married women as guardians.



# THE LAW OF HUSBAND AND WIFE.

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## PART I. INTRODUCTORY.

- II. THE RELATION OF HUSBAND AND WIFE.
- III. THE ESTATES OF HUSBAND AND WIFE.
- IV. THE STATUS OF MARRIED WOMEN.

## PART I. — INTRODUCTORY.

### CHAP. I. THE SUBJECT DEFINED AND DIVIDED.

- II. SOURCES, INTERPRETATION, AND CONFLICTS OF THE LAW.



# HUSBAND AND WIFE.

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## CHAPTER I.

### THE SUBJECT DEFINED AND DIVIDED.

- § 1. Husband, wife, children, the married state.
- § 2. The relation of husband and wife.
- § 3. The estates of husband and wife.
- § 4. The status of married woman.
- § 5. The relation of parent and child.

§ 1. **Husband, wife, children, the married state.**—After a valid marriage between them, man and woman are husband and wife, and their offspring are legitimate or legal children. Those continuing conditions which determine the legal position of husband and wife with regard to each other, their children, and the rest of the community, constitute the status of marriage, or the marriage or married state. The married state may be conveniently divided into, (1) the relation of husband and wife; (2) the estates of husband and wife; (3) the status of married women; and (4) the relation of parent and child.

§ 2. **The relation of husband and wife.**—Husband and wife are, by the law, bound together in a peculiar manner, with special obligations and rights with regard to each other, which constitute the relation of husband and wife. This relation may be conveniently divided into, (1) the unity of husband and wife and its consequences;

(2) the mutual rights and obligations of husband and wife and their consequences; (3) dealings of husband and wife, the one for the other; and (4) dealings between husband and wife.

§ 3. **Estates of husband and wife.**—Husband and wife stand in a peculiar position with regard to their own and each other's property—the conditions of their tenure constitute the estates of husband and wife. These may be conveniently divided into, (1) husband's estate in his own property; (2) husband's estate in his wife's realty, (3) and personalty; (4) wife's estates in her own property; (5) wife's estate in her husband's realty, (6) and personalty; (7) estates of husband and wife in their joint and common property—joint and common estates of husband and wife.

§ 4. **The status of married women.**—Besides having special rights and obligations with regard to their husbands, growing out of the relation of husband and wife, wives stand in a peculiar position in the community, the conditions of which, their disabilities, privileges, rights, and obligations, constitute the status of married women. This may be conveniently divided into, (1) coverture and its effect generally; (2) capacity of married women to hold and enjoy property; (3) wills of married women; (4) deeds of married woman; (5) contracts of married women; (6) torts of married women; (7) crimes of married women; (8) suits of married women; (9) married women as traders; (10) married women as trustees, etc.; (11) estoppels against married women.

§ 5. **Relation of parent and child.**—The rights and obligations of husband and wife with regard to their offspring constitute the relation of parent and child.

In a certain sense this relation therefore belongs to the subject of husband and wife; but it is customarily treated separately, and will not be discussed in this volume.

## CHAPTER II.

## SOURCES, INTERPRETATION, AND CONFLICTS.

ART. I. SOURCES OF THE LAW, §§ 6-10.

II. INTERPRETATION OF THE LAW, §§ 11-18.

III. PAST AND PRESENT LAW, §§ 19-23.

IV. HOME AND FOREIGN LAW, §§ 24-37.

## ARTICLE I.—SOURCES OF THE LAW.

- § 6. The common law and English statutes.
- § 7. The civil law and codes.
- § 8. The equity system.
- § 9. Statutes.
- § 10. The resulting questions.

§ 6. The common law and English statutes.—The common law of England, including many British statutes in force before 1776,<sup>1</sup> forms the basis of the law in nearly all the United States, and is here still in force so far as it is consistent with the principles of republican government and with the statutes of the various States.<sup>2</sup> This is so in Alabama, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Virginia, Vermont, and Wisconsin.<sup>3</sup> Some of these States were originally colonized by the English,<sup>4</sup> others by statute have made the common law their own.<sup>5</sup> But the common law is unknown in Louisiana,<sup>6</sup> and it is doubtful whether it is in force in Iowa.<sup>7</sup> It is, of course, in force in England.<sup>8</sup> Thus, the law courts in the United States are bound by the common-law fiction

of the unity of husband and wife,<sup>9</sup> and an estate like curtesy exists, though not created by statute.<sup>10</sup>

1 Alex. Brit. Stats. in Md.; *Sibley v. Williams*, 3 Gill & J. 52, 62; *Brimley v. Whiting*, 5 Pick. 348, 353; *Stevens v. Enders*, 13 N. J. L. 271, 273, 274.

2 *Pawlet v. Clark*, 9 Cranch, 292, 333; *Wheaton v. Peters*, 8 Peters, 591, 659; *Van Ness v. Pacard*, 2 Peters, 137, 144; *Pollard v. Hagan*, 3 How. 212; *Carter v. Balfour*, 19 Ala. 814, 829; *Grande v. Foy*, Hemp. 105, 109; Cal. Code, § 4468; Colo. G. L. 1877, p. 132, § 156; *Wilford v. Grant*, Kirby, 114, 117; Fla. Dig. 1881, p. 108, § 7; *Neal v. Farmer*, 9 Ga. 555, 560; *Phumleigh v. Cook*, 13 Ill. 669, 671; *Dawson v. Shaver*, 1 Blackf. 204, 206; *Gorham v. Luckett*, 6 Mon. B. 638, 645; *Colley v. Merrill*, 6 Me. 50, 55; Alex. Brit. Stats. in Md.; *Going v. Emery*, 16 Pick. 107, 115, 116; 26 Am. Dec. 645; *Stout v. Keyes*, 2 Doug. (Mich.) 184, 188; *Wheelock v. Cozzens*, 7 Miss. 279, 283; *Reaume v. Chambers*, 22 Mo. 36, 51; Nev. C. L. 1873, § 1; *State v. Moore*, 26 N. H. 448, 455; *Stevens v. Enders*, 13 N. J. L. 271, 273, 274; *Waterford v. People*, 9 Barb. 161, 166; *State v. Huntly*, 3 Fred. 418; *Betts v. Wise*, 11 Ohio, 219, 221; Rep. of Judges, 5 Bin. 595, 601; R. I. R. S. 1882, p. 771, § 3; *State v. Sutcliffe*, 4 Sirob. 372, 397; *Jacob v. State*, 3 Humph. 493, 514; Tex. R. S. 1879, § 3128; *State v. Briggs*, 1 Aiken, 226, 229; *Commonw. v. Lodge*, 2 Gratt. 579, 580; Wis. R. S. 1878, p. 35, § 13. See Am. Law Reg. Sept. 1882.

3 Cases in note 2; *Bish. First Bk.* §§ 43-60; 1 *Burge Col. & For. L.* pp. 567, 568.

4 *State v. Buchanan*, 5 Har. & J. 317, 355-357.

5 *Grande v. Foy*, Hemp. 105, 108, 109.

6 *Parsons v. Bedford*, 3 Peters, 433, 449.

7 *O'Ferrall v. Simplot*, 4 Iowa, 381, 391.

8 See Blackstone's Commentaries.

9 *White v. Wager*, 25 N. Y. 329; *post*, § 39.

10 *Reaume v. Chambers*, 22 Mo. 36, 51.

§ 7. The civil law and Codes.—The civil law of Rome and the Codes form the basis of the law of France and Spain,<sup>1</sup> and therefore prevailed in the French and Spanish colonies;<sup>2</sup> it was thus once in force in Arkansas,<sup>3</sup> Iowa,<sup>4</sup> Michigan,<sup>5</sup> Missouri,<sup>6</sup> Texas,<sup>7</sup> and other States;<sup>8</sup> but these have by statute adopted the common law,<sup>9</sup> and Louisiana alone has a system of her own based upon the civil law.<sup>10</sup> Still the civil-law idea of the duality of husband and wife<sup>11</sup> has been long accepted in courts of equity,<sup>12</sup> and has been generally adopted in modern statutes;<sup>13</sup> and in the new States like Texas, in regard to matters occurring before the adoption of the common law, has lately been enforced.<sup>14</sup> So the civil-

law system of community property exists in California, Louisiana, Nevada, and Texas.<sup>15</sup>

- 1 Schouler Husb. & W. § 5.
- 2 Du Ponceau, Jurisd. 74, 79.
- 3 Grande v. Foy, Hemp. 105, 108.
- 4 O'Ferrall v. Simplot, 4 Iowa, 381, 384.
- 5 Du Ponceau Jurisd. 74.
- 6 Du Ponceau Jurisd. 79.
- 7 Bish. First Book, § 57.
- 8 See Bish. First Book, §§ 47-53; Du Ponceau Jurisd. 74-82.
- 9 *Ante*, § 6.
- 10 Parsons v. Bedford, 3 Peters, 433, 449.
- 11 1 Burge Col. & For. L. 202; *post*, § 39.
- 12 *Post*, §§ 8, 35, 42, 197-216.
- 13 *Post*, §§ 9, 35, 43, 217-243.
- 14 Lee v. Smith, 18 Tex. 141, 145.
- 15 Discussed, *post*, §§ 312-319.

§ 8. **The equity system.**—Courts of equity, by virtue of their jurisdiction over trusts, have always taken cognizance of trusts for the separate use of married women, and have recognized to this extent the separate existence of the wife. This jurisdiction has been gradually extended to the general relief of married women.<sup>2</sup> Thus, when at law a married woman could not hold property at all, she could be protected in the enjoyment of such as was settled in trust for her sole and separate use in equity;<sup>3</sup> so a contract between husband and wife is absolutely void at common law, but may be valid in equity.<sup>4</sup> In Pennsylvania equity and law are administered by the same court, and the distinction between law and equity does not, therefore, to such an extent prevail.<sup>5</sup>

1 See Harvey, 1 P. Wms. 124; Tullett v. Armstrong, 1 Beav. 21, 22; Sturgis v. Champuys, 5 Mont. & C. 103.

2 Macq. Husb. & W. 284, 285; 1 Bish. M. W. §§ 16-22; Schoul. Husb. & W. § 190; Pybus v. Smith, 4 Brown Ch. 485.

3 See Chew v. Beall, 13 Md. 348, 360; *post*, §§ 197-216.



4 See *Barron*, 24 Vt. 375, 398, 399; *post*, § 42.

5 See *Pollard v. Shaffer*, 1 Dall. 210, 214; *Bisbing v. Graham*, 14 Pa. St. 14, 18; *Miller*, 44 Pa. St. 170; *Tyson*, 10 Pa. St. 220; *Rees v. Waters*, 9 Watts, 90, 94; *Rawle* "Equity in Pa." 87.

§ 9. **Statutes.**—Each State has full control of the domestic condition of its domiciled inhabitants, and may, so far as there is no prohibition in the Constitution, through its legislature, change and establish the rights, liabilities, disabilities, and status of husbands and wives.<sup>1</sup> In the United States, Congress has no power to pass laws on this subject which will be enforced in the several States.<sup>2</sup> So unsatisfactory has the common-law system of husband and wife been found that all the States have availed themselves of their aforesaid power to change the law, and now statutes are the most important of all the sources of the law to be consulted. A reference to the compiled laws of each State with access to which this book is written is appended.<sup>3</sup> It would be interesting to trace the history of the law in the several States, but the scope of this work does not allow this to be done.<sup>4</sup>

1 *Stone v. Gazzam*, 46 Ala. 269, 274; this is nowhere denied.

2 *Strader v. Graham*, 10 How. 82, 93; *Green v. State*, 58 Ala. 190, 195; *State v. Gibson*, 36 Ind. 389, 395-400; *Sewall*, 122 Mass. 156, 161; *Hopkins*, 3 Mass. 158, 159; *Hunt*, 72 N. Y. 217, 228; *Doc. Lonas v. State*, 3 Heisk. 287, 301; *Fraser v. State*, 3 Tex. App. 263, 275; *Cook*, 56 Wis. 396; 14 N. W. Rep. 33, 36, 443.

3 Ala. Code, 1876; Ark. Dig. 1874; Cal. Civ. Code, 1881; Colo. G. L. 1877; Conn. G. S. 1875; Del. R. C. 1874; Fla. Dig. 1881; Ga. R. C. 1878; Ill. R. S. 1880; Ind. R. S. 1881; Iowa, R. C. 1880; Kan. C. L. 1881; Ky. G. S. 1881; La. Civ. Code, 1875; Me. R. S. 1871; Md. R. C. 1878; Mass. P. S. 1882; Mich. R. S. 1882; Minn. St. 1878; Miss. R. S. 1880; Mo. R. S. 1879; Neb. C. S. 1881; Nev. C. L. 1873; N. H. G. L. 1878; N. J. Rev. 1877; N. Y. R. S. 1882; N. C. Bat. Rev. 1873; Ohio R. S. 1880; Oreg. G. L. 1872; Pa. Prd. Dig. 1872-1876; R. I. P. S. 1882; S. C. G. S. 1882; Tenn. R. S. 1873; Tex. R. S. 1879; Va. Code, 1873; Vt. R. L. 1880; W. Va. R. S. 1879; Wis. R. S. 1878.

4 See, for interesting discussions of the law, *Day v. Gould*, 31 Cal. 631, 637-646; *Wells v. Caywood*, 3 Colo. 487, 490-493; *Jackson v. Hubbard*, 36 Conn. 10, 15, 16; *Martin v. Robson*, 65 Ill. 131; *Cooper v. How*, 49 Ind. 393, 400; *Tong v. Martin*, 15 Mich. 60, 66, 67; *Albin v. Lord*, 39 N. H. 196, 201; *White v. Woger*, 25 N. Y. 323, 330-332; *Radford v. Carville*, 13 W. Va. 573, 581-674.

§ 10. The resulting questions.—1. Since the law is in part unwritten and in part statutory, the question arises, how do the two combine? What do the statutes mean? How are the laws of husband and wife to be interpreted?<sup>1</sup> 2. Since new statutes are constantly changing the law, the question arises, when do these changes take effect? Does this case depend on past or present law?<sup>2</sup> 3. Since every State has its own law, the question arises, what State's law applies? Does this case depend on home, or on some foreign, law?<sup>3</sup>

1 *Post*, §§ 11-18.

2 *Post*, §§ 19-23.

3 *Post*, §§ 24-37.

## ARTICLE. II.—INTERPRETATION OF THE LAW.

§ 11. Interpretation in general.

§ 12. Rules of interpretation.

§ 13. General statutes do not affect husband and wife.

§ 14. Married women acts do not affect marriage relation.

§ 15. Property acts do not affect personal status.

§ 16. Strict and liberal interpretation.

§ 17. Prospective interpretation.

§ 18. Local interpretation.

§ 11. Interpretation in general.—The main difficulty in the administration of the law of husband and wife lies in ascertaining the meaning and effect of statutes.<sup>1</sup> These are often carelessly and ignorantly drawn, and not according to rule, so that it is very difficult by rule to determine what they mean.<sup>2</sup> Still certain rules may be formulated which will serve for guidance in the great mass of cases,<sup>3</sup> and the more special effect of particular statutes will be considered under the various titles.<sup>4</sup>

1 And yet the words "interpretation" and "construction" are not in the index of Schouler's "Husband and Wife," or Kelly's "Contracts of Married Women," the latest books on marriage rights.

2 See Sedg. Const. Stats. pp. 263-271 ; 2 Bish. M. W. §§ 11-27 ; Stewart M. & D. §§ 51, 53, 57, 89, 91, 97, 216, 228, 451.

3 *Post*, §§ 12-18.

4 See index "Statutes," "Construction," and the various titles.

§ 12. **Rules of interpretation.**—No statute is complete in itself but it combines with the pre-existing law ;<sup>1</sup> and thus arises the following rule : (1) All provisions of law statutory and unwritten, at whatever several dates established, are to be construed together as contracting, expanding, enlarging, and attenuating one another into one harmonious system of jurisprudence.<sup>2</sup> A statute may be *general* and refer to all persons without mentioning husband and wife, or it may particularly refer to husband and wife ; and in the latter case may refer to one or more of the divisions of husband and wife—the relation of husband and wife, the estates of husband and wife, the status of married women ;<sup>3</sup> and thus arise the following rules : (2) no general statute affects the law of husband and wife ;<sup>4</sup> (3) married women acts do not affect the relation of husband and wife ;<sup>5</sup> (4) property acts do not affect the personal status of husband and wife.<sup>6</sup> The great majority of husband and wife statutes are remedial and enabling, and to construe them strictly would be to defeat their purpose ; on the other hand they are in derogation of the common law, and should therefore be strictly construed ; hence, arises the following rule : (5) statutes relating to husband and wife are construed *strictly* so far as they give new rights or impose new obligations, but *liberally* so far as they secure the enjoyment of rights or the enforcement of obligations.<sup>7</sup> Statutes are passed which contain no provision as to when they shall take effect ; hence arises the rule : (6) all statutes are prospectively construed.<sup>8</sup> Statutes are passed which make no distinction between rights, etc., in and

out of the State; hence arises the rule: (7) all statutes are locally construed;<sup>9</sup> other rules have been laid down, such as: (8) there can be no repeal by implication;<sup>10</sup> (9) married women separate property acts are declaratory of equity, and are construed in accordance with the principles thereof;<sup>11</sup> (10) statutes giving new remedies, etc., do not take away old ones;<sup>12</sup> (11) statutes which take away capacities, etc., are strictly construed.<sup>13</sup>

1 See *Canal v. Railroad*, 4 Gill & J. 1, 152.

2 See *Cole v. Van Riper*, 44 Ill. 53, 63; 1 Bish. M. W. § 33; 2 Bish. M. W. §§ 11, 12; and the rules *infra*.

3 *Ante*, §§ 1-4.

4 *Hemlingway v. Scales*, 42 Miss. 1, 17; 2 Am. Rep. 586; *post*, § 13.

5 *Walker v. Reamy*, 36 Pa. St. 410, 414; *post*, § 14.

6 *Albin v. Lord*, 39 N. H. 196, 202; *post*, § 15.

7 *Abshire v. State*, 53 Ind. 64, 67; *post*, § 16.

8 *Post*, §§ 17, 19-23.

9 *Post*, §§ 18, 24-37.

10 See *Mayor v. Magruder*, 31 Md. 381, 383, 387; *Berley v. Ram-pacher*, 5 Duer, 183, 186.

11 *Richardson v. Stodder*, 100 Mass. 528, 530; *Snyder v. People*, 26 Mich. 103, 109; 12 Am. Rep. 302; *Albin v. Lord*, 39 N. H. 196, 203, 204; *Batchelder v. Sargent*, 47 N. H. 262, 265, 266; *Peake v. La Baw*, 21 N. J. Eq. 282; *Johnson v. Cummins*, 16 N. J. Eq. 97, 105, 106; *Yale v. Dederer*, 18 N. Y. 265, 272, 279; *Ballin v. Dillaye*, 37 N. Y. 35, 37; *Walker v. Reamy*, 36 Pa. St. 410, 414.

12 *Herzberg v. Sachse*, 60 Md. 426, 432.

13 See *Ingoldsby v. Juan*, 12 Cal. 575; *MacLay v. Love*, 25 Cal. 331; *Bodley v. Ferguson*, 30 Cal. 518.

§ 13. General statutes do not affect husband and wife.— No general statute affects the law of husband and wife; to change such law a statute must expressly refer to it.<sup>1</sup> Thus, statutes enabling persons generally to contract, will, or testify do not enable married women to make contracts<sup>2</sup> or wills,<sup>3</sup> or husband and wife to testify for or against each other.<sup>4</sup> So statutes relating to forfeitures for treason,<sup>5</sup> to bastardy proceedings,<sup>6</sup> and to insolvency,<sup>7</sup> have been held not to apply to married women. So statutes referring to joint tenants do not

affect the holding of husband and wife by entireties.<sup>8</sup> But a statute holding the purchaser at a mortgage sale liable for the difference in case of non-payment and resale, was held applicable to married women,<sup>9</sup> and so have bank acts as to the liability of stockholders.<sup>10</sup>

1 See *Dano v. M. O.* 27 Ark. 564, 567; *Phillips v. State*, 15 Ga. 518, 521; *Kieffer v. Ehler*, 13 Pa. St. 388, 391; cases *infra*.

2 This is so plain that it has never been questioned: See *Robertson v. Burner*, 24 Miss. 242, 244; *post*, § 363.

3 *Cutter v. Butler*, 25 N. H. 343; *Baker v. Chastang*, 18 Ala. 417, 422; *Fitch v. Brainerd*, 2 Day, 163, 190; *Osgood v. Breed*, 12 Mass. 525, 530; *Morse v. Thompson*, 4 Cush. 562, 563; *post*, § 345.

4 *Stapleton v. Crofts*, 18 Add. & E. N. S. 367, 369; *Alcock*, 12 Eng. L. & Eq. 354, 355; *Lucas v. Brooks*, 18 Wall. 436, 452; *Jones*, 6 Biss. 68, 69; *Sumner v. Cooke*, 51 Ala. 521; *Lincoln v. Madaus*, 102 Ill. 417, 421; *Mitchinson v. Cross*, 58 Ill. 366, 369; *Russ v. Steamboat*, 14 Iowa, 363, 374; *McKeen v. Frost*, 46 Me. 239, 248, 250; *Dwelly*, 46 Me. 377, 380; *Turpin v. State*, 55 Md. 462, 477; *Peaslee v. McLoon*, 16 Gray, 488, 489; *Kelly v. Drew*, 12 Allen, 107, 109; *Anon.* 53 Miss. 15, 18; *Byrd v. State*, 57 Miss. 243; 34 Am. Rep. 440; *Dunlap v. Hearn*, 37 Miss. 471, 474; *Young v. Gilman*, 46 N. H. 484, 486; *Corson*, 44 N. H. 587, 588; *Longendyke*, 44 Barb. 366, 370; *Schultz v. State*, 32 Ohio St. 276, 280; *Gibson v. Com.* 87 Pa. St. 253, 256; *State v. Workman*, 15 S. C. 540, 546; *Stafford*, 41 Tex. 111, 118; *Gee v. Scott*, 48 Tex. 510, 514; 26 Am. Rep. 331; *Cram*, 33 Vt. 15, 20; *Manchester*, 24 Vt. 649, 650; but see *Merriam v. Hartford*, 20 Conn. 354, 363; *Berlin*, 52 Mo. 151, 153; *post*, § 56.

5 *Martin v. Com.* 1 Mass. 347, 391.

6 *Wilbur v. Crane*, 13 Pick. 284, 290.

7 *Relief v. Schmidt*, 55 Md. 97, 98.

8 *Flading v. Rose*, 58 Md. 13, 20; *post*, § 206.

9 *Fowler v. Jacob*, Md. Ct. App. Oct. 1883; Md. Law Rec. Oct. 4, 1884.

10 *The Reciprocity Bank*, 22 N. H. 9, 15; *post*, § 369.

§ 14. Married women acts do not affect the marriage relation.—Married women acts, or acts expressly referring only to the disabilities or the property rights of married women, do not affect the relation of husband and wife; they change the status and rights of the husband only so far as is necessary to secure to the wife the enjoyment of her rights.<sup>1</sup> Thus, in spite of a married women act the husband and wife are bound, as under the common law, to cohabit;<sup>2</sup> the husband is head of the family,<sup>3</sup> and is bound to support his wife,<sup>4</sup> and is entitled to her person<sup>5</sup> and labor.<sup>6</sup> If the act

secures her earnings to her, she is still her husband's helpmeet,<sup>7</sup> and cannot charge for services to him.<sup>8</sup> A statute enabling her to hold and to convey property does not necessarily enable her to be her husband's grantee<sup>9</sup> or grantor.<sup>10</sup> A statute enabling her to contract or sue generally does not authorize contracts with<sup>11</sup> or suits against<sup>12</sup> her husband. A statute securing to her her separate property does not wholly exclude her husband from the enjoyment of it;<sup>13</sup> she cannot forbid him her house,<sup>14</sup> or restrict him to the use of a certain chair,<sup>15</sup> or remove her property from his custody;<sup>16</sup> he is not guilty of trespass for entering her premises,<sup>17</sup> or of trover,<sup>18</sup> or larceny,<sup>19</sup> for taking her goods; nor is his liability for her contracts<sup>20</sup> or torts<sup>21</sup> thereby removed.

1 In addition to cases cited *infra*, see cases *post*, § 15.

2 See *Cole v. Van Riper*, 44 Ill. 58, 63; *Schindel*, 12 Md. 108, 121, 312, 313; *Snyder v. People*, 26 Mich. 106, 110; 12 Am. Rep. 302; *Walker v. Reamy*, 36 Pa. St. 410, 414; *post*, § 59.

3 *Glover v. Alcott*, 11 Mich. 471, 485; *post*, § 60.

4 *Snyder v. People*, 26 Mich. 106, 109; 12 Am. Rep. 302; *post*, § 64.

5 *Raybold*, 20 Pa. St. 308, 311; *post*, §§ 62, 63, 65.

6 *Seitz v. Mitchell*, 94 U. S. 580, 581; *McLemore v. Pinkston*, 31 Ala. 267, 270; *Mitchell v. Seitz*, 1 McAr. 480; *Bear v. Hays*, 36 Ill. 250, 281; *Farrell v. Patterson*, 43 Ill. 52, 59; *Connor v. Berry*, 46 Ill. 370, 372; *Schwartz v. Saunders*, 46 Ill. 18, 24; *McMurtry v. Webster*, 48 Ill. 123, 124; *Marshall v. Duke*, 51 Ind. 62; *Duncan v. Roselle*, 15 Iowa, 501, 503; *Merrill v. Smith*, 37 Me. 394, 396; *Glover v. Alcott*, 11 Mich. 471, 482; *Henderson v. Warmack*, 27 Miss. 830, 835; *Apple v. Ganong*, 47 Miss. 189, 199; *Hoyt v. White*, 46 N. H. 45, 47; *Quidort v. Pergeaux*, 18 N. J. Eq. 472, 480; *Rider v. Hulse*, 33 Barb. 264, 270; *Syme v. Riddle*, 88 N. C. 463, 465; *Raybold*, 20 Pa. St. 308, 311; *post*, § 65.

7 *Mewhirter v. Hatten*, 42 Iowa, 288, 292; 20 Am. Rep. 618; *post*, § 65.

8 *Hazelbaker v. Goodfellow*, 64 Ill. 238, 241; *Mewhirter v. Hatten*, 42 Iowa, 288, 291, 293; 20 Am. Rep. 618; *Grant v. Green*, 41 Iowa, 88, 91, 92; *Glover v. Alcott*, 11 Mich. 471, 483; *Brooks v. Schwerin*, 54 N. Y. 343, 348; *Reynolds v. Robinson*, 64 N. Y. 589, 593; *post*, § 65.

9 See *Trader v. Lowe*, 45 Md. 1, 14; *infra*, n. 10; *post*, § 43.

10 *White v. Wager*, 25 N. Y. 328, 332; *infra*, n. 10; *post*, § 43.

11 This is disputed: that she can; See *Bank v. Banks*, 101 U. S. 240, 244, 245; *Kinkead*, 3 Biss. 405, 410; *Wells v. Caywood*, 3 Colo. 487, 494; *Hamilton*, 89 Ill. 349, 351; *Robertson*, 25 Iowa, 350, 355; *Allen v. Hooper*, 50 Me. 371, 374, 375; *Jenne v. Marble*, 37 Mich. 319, 321, 323; *Ransom*, 30 Mich. 328, 330; *Rankin v. West*, 25 Mich. 195, 200; *Burdeno*

*v. Amperse*, 14 Mich. 91, 97; *Albin v. Lord*, 39 N. H. 196, 203, 204; *Zimmermann v. Erhard*, 58 How. Pr. 11, 13; *Woodworth v. Sweet*, 51 N. Y. 8, 11. That she cannot, see *Hoker v. Boggs*, 63 Ill. 161, 163; *Knowles v. Hull*, 99 Mass. 562, 564, 565; *Lord v. Parker*, 3 Allen, 127, 129; *Aultman v. Obermeyer*, 6 Neb. 260, 264; *Savage v. O'Neil*, 42 Barb. 374, 379; *White v. Wager*, 25 N. Y. 328, 330, 334. See *post*, § 43.

12 *Smith v. Gorman*, 41 Me. 405, 408; *Libby v. Berry*, 74 Me. 236, 238; *Barton* 32 Md. 214, 224; *Freethy*, 42 Barb. 641, 645; *post*, § 54.

13 *Cole v. Van Riper*, 44 Ill. 53, 63; *Schindel*, 12 Md. 108, 121; *Snyder v. People*, 26 Mich. 106, 109; 12 Am. Rep. 302; *Walker v. Reamy*, 36 Pa. St. 410, 414; *post*, §§ 59, 60.

14 *Cole v. Van Riper*, 41 Ill. 53, 63; *Snyder v. People*, 26 Mich. 106, 110; 12 Am. Rep. 302; *post*, § 9.

15 *Walker v. Reamy*, 36 Pa. St. 410, 414.

16 *Schindel*, 12 Md. 108, 121.

17 *Snyder v. People*, 26 Mich. 106, 108, 111; 12 Am. Rep. 302; *Walker v. Reamy*, 36 Pa. St. 410, 414; *post*, § 48.

18 *Walker v. Reamy*, 36 Pa. St. 410, 414; *post*, § 48.

19 *Thomas*, 51 Ill. 162, 165; *post*, § 43.

20 *Connor v. Berry*, 46 Ill. 370, 372; *Berley v. Rampacher*, 5 Duer. 133; *contra*, *Hawarth v. Warmiser*, 53 Ill. 48, 49. See *post*, § 67.

21 *Choen v. Porter*, 66 Ind. 194, 196, 199; *McElfresh v. Kirkendall*, 36 Iowa, 224, 227; *Eders v. Beck*, 18 Iowa, 86, 87; *Ferguson v. Brooks*, 67 Me. 251, 257; *Baum v. Mullen*, 47 N. Y. 577, 578; *Fowler v. Chichester*, 26 Ohio St. 9, 14; *McQueen v. Fulgham*, 27 Tex. 463, 467; *contra*, *Martin v. Robson*, 65 Ill. 129, 130, 139; 16 Am. Rep. 578. See *post*, § 66.

§ 15. Statutes relating to estates of husband and wife do not affect their personal status.—Statutes relating to estates or property rights of husband and wife do not affect their personal status or relation.<sup>1</sup> Thus, a statute authorizing conveyances between husband and wife does not remove their incapacity to contract together personally;<sup>2</sup> and a statute securing property to a married woman as if unmarried does not remove her personal disabilities;<sup>3</sup> for instance, to contract.<sup>4</sup> Many of the illustrations under section 14 also support this rule.

1 See *Stone v. Gazzam*, 46 Ala. 274, 275; *Huff v. Wright*, 39 Ga. 43; *Cole v. Van Riper*, 44 Ill. 53, 63; *Douglas v. Gausman*, 68 Ill. 172; *Patten*, 75 Ill. 446, 449; *Sims v. Rickets*, 35 Ind. 181, 191; 9 Am. Rep. 679; *Knaggs v. Mastin*, 9 Kan. 547; *Schindel*, 12 Md. 108, 121; *Snyder v. People*, 26 Mich. 106, 108, 110; 12 Am. Rep. 302; *Henderson v. Warmack*, 27 Miss. 830, 835; *Albin v. Lord*, 39 N. H. 196, 202; *Ballin v. Dillaye*, 37 N. Y. 35, 37; *Syme v. Riddle*, 88 N. C. 463, 465; *Walker v. Reamy*, 36 Pa. St. 410, 414; *Raybold*, 20 Pa. St. 308, 311; *Avery v. Doane*, 1 Biss. 66, 67; *ante*, § 14.

2 See *Jenne v. Marble*, 37 Mich. 319, 321; *post*, § 43.

3 *Albin v. Lord*, 39 N. H. 196, 202; *Ballin v. Dillaye*, 37 N. Y. 35, 37; *Glyde v. Keister*, 32 Pa. St. 85, 88; *post*, § 43.

4 See *Norris v. Lantz*, 18 Md. 260, 261; *Sturmfeltz v. Frickey*, 43 Md. 469, 471; *Groene v. Frondhof*, 1 Disn. 504, 505; *Kavanaugh v. Brown*, 1 Tex. 481, 484. *post*, CONTRACTS OF MARRIED WOMEN, § 370.

§ 16. **Strict and liberal interpretation of marriage statutes.**—Statutes relating to husband and wife are construed strictly so far as they give new rights or impose new obligations, but liberally so far as they secure the enjoyment of rights or the enforcement of obligations. The first clause of this rule seems to be the effect of the true application to marriage statutes of the familiar rule that statutes in derogation of the common law are strictly construed.<sup>1</sup> Thus, a statute giving rights in certain kinds of property does not affect other property,<sup>2</sup> the Maryland statute securing to a married women property acquired by gift, grant, devise, or bequest does not affect property acquired by descent,<sup>3</sup> or a legacy which at common law would have lapsed.<sup>4</sup> A statute enabling a married woman to make specified contracts does not enable her to make any not specified;<sup>5</sup> nor does one enabling her to will, to sell,<sup>6</sup> or one giving her power to hold and dispose of during her life, to will;<sup>7</sup> nor does a right to hold carry with it a right to buy and mortgage for the purchase money.<sup>8</sup> The second clause of the above rule seems to be the effect of the true application to marriage statutes of the familiar rule that enabling and remedial statutes are liberally construed.<sup>9</sup> Thus, when a statute enables a married woman to trade, she may trade on credit and make executory contracts;<sup>10</sup> when one enables her to manage her property as if single, she may employ an agent to manage it;<sup>11</sup> when one gives her certain property, the increase of such property is likewise hers;<sup>12</sup> when one empowers her to administer alone she has full



power to perform without reference to her husband all acts relating to the administration.<sup>13</sup>

1 Sedg. Const. Stats. p. 267 and notes; *Cole v. Van Riper*, 44 Ill. 58, 63; *Brookings v. White*, 49 Me. 479, 481; *Lord v. Parker*, 3 Allen, 127, 129; *Edwards v. Stevens*, 3 Allen, 315; *Tong v. Marvin*, 15 Mich. 60, 73; *Brown v. Fifield*, 4 Mich. 322, 326; *Sullivan v. La Crosse*, 10 Minn. 386, 390; *Blackman v. Wheaton*, 13 Minn. 326, 331; *Eckert v. Reuter*, 33 N. J. L. 266, 268; *Hurd v. Cass*, 9 Barb. 366, 368; *Berley v. Ram-pacher*, 5 Duer, 183, 186; *Freethy*, 42 Barb. 641, 642; *Dewes v. Good-enough*, 56 Barb. 54, 58; *Perkins*, 62 Barb. 531. But see Cal. Civ. Code, § 5004.

2 See 2 Bish. M. W. § 17.

3 So the statute was amended and "descent" added: Md. Acts 1874, ch. 57; see *Abshire v. State*, 53 Ind. 64, 67.

4 *Williams v. Bailee* Circuit Ct. Carroll Co. Md. May, 1875, Md. Law Record, Jan. 14, 1882.

5 *Sturmfeltz v. Frickey*, 43 Md. 569, 571; *Robertson v. Bruner*, 24 Miss. 242, 244.

6 *Brown v. Fifield*, 4 Mich. 322, 326.

7 *Harker*, 3 Har. (Del.) 51, 59.

8 *Dunning v. Pike*, 46 Me. 461, 463; *post*, §§ 223, 327, 373.

9 Sedg. Const. Stats. pp. 270, 271; *De Vries v. Conklin*, 22 Mich. 255, 259; *Lee v. Bennett*, 31 Miss. 119, 125; *Dunbar v. Meyer*, 43 Miss. 679, 645; *Corn v. Babcock*, 57 Barb. 222; 42 N. Y. 613; *Goss v. Cahill*, 42 Barb. 310, 315; *Power v. Lester*, 17 How. Pr. 413, 416; *Dwir*, Pa. St. 106, 109; *Bergey*, 79 Pa. St. 408, 418.

10 *Young v. Gori*, 13 Abb. Pr. 13, 14.

11 *Southard v. Plummer*, 36 Me. 61, 70, 71; *post*, §§ 82, 84.

12 *Williams v. McGrade*, 13 Minn. 46, 52, 53.

13 *Huls v. Buntin*, 47 Ill. 396, 399.

§ 17. **Prospective construction of statutes.**—In the absence of express provision statutes are applied only to acts taking place, and rights arising after their passage.<sup>1</sup>

1 Considered fully, *post*, §§ 19-23.

§ 18. **Local construction of statutes.**—In the absence of express provision statutes are applied only to acts taking place within, or persons domiciled within, or property situate within, or suits instituted within, the State where they are passed.<sup>1</sup>

1 Considered fully, *post*, §§ 24-36.

# ARTICLE III.—PAST AND PRESENT LAW.

- § 19. Prospective and retrospective statutes.
- § 20. All statutes *prima facie* prospective.
- § 21. Retrospective statutes, validity of.
- § 22. Retrospective statutes, vested rights.
- § 23. Retrospective statutes, curative acts.

§ 19. Prospective and retrospective statutes.—Past and present law may be administered side by side. Thus, in 1877 a court decides that the law gives a husband no curtesy in his wife's lands because she holds them as statutory separate property under the Act of 1860;<sup>1</sup> and in 1880 the same court decides that a husband has curtesy because the marriage took place and the property was acquired before the Act of 1860.<sup>2</sup> In one case the Act of 1860 governs, in the other the law which has been repealed is applied. This is because there are certain rights existing at the time a statute is passed which it cannot change,<sup>3</sup> others that it will be construed not to change unless the intention to do so clearly appears.<sup>4</sup> A statute which changes or attempts to change existing rights is called *retroactive* or *retrospective*; one which applies only to rights arising, or which might have arisen subsequently to its passage, is called *prospective*.<sup>5</sup> It may therefore be an important consideration, in determining the law of a marriage right, when the marriage took place, and when, in the case of property rights, the property was acquired.<sup>6</sup>

1 Mason v. Johnson, 47 Md. 347, 357, 358.

2 Porter v. Bowers, 55 Md. 213, 215, 216.

3 Potis v. Parker, 22 Tex. 701; *post*, § 22.

4 Elliott v. Nichols, 4 Bush, 502, 503; *post*, § 20.

5 See Stewart M. & D. §§ 228, 451; Cooley Const. Lim. 371, 462, n. 1; 1 Bish. M. & D. §§ 670-676; 2 Bish. M. W. §§ 36-51; Satterlee v. Matthewson, 2 Peters, 413, 414; Noel v. Ewing, 9 Ind. 37, 55-59; Elliott, 38 Md. 357, 362; Butler v. Palmer, 1 Hill, 324, 329, 330.

6 See Sutton v. Askew, 66 N. C. 172, 176, 177; 8 Am. Rep. 500; Weston v. Johnson, 69 N. C. 189, 192; Phillips v. Disney, 16 Ohio, 629, 651.

§ 20. All statutes *prima facie* prospective.—Some statutes expressly state when they shall take effect and how far they shall apply to existing rights:<sup>1</sup> in such cases there is no room for interpretation.<sup>2</sup> But statutes which do not contain express provisions of this kind, are presumed to apply only to rights arising after their enactment,<sup>3</sup> and not to destroy existing rights: if these are vested, because such construction might nullify the statute;<sup>4</sup> if valuable only, because it is deemed unjust to take away, to a person's damage, rights acquired in reliance on previous law.<sup>5</sup> Thus, a statute giving wives a new right in "all" their husbands' property will apply only to subsequent wives or subsequent property;<sup>6</sup> and a statute giving a wife separate property will not deprive a husband of his freehold estate *jure ucoris*.<sup>7</sup> But this rule—*Nova constitutio futuris formam imponere debet, non præteritis*<sup>8</sup>—has no foundation when a statute is both constitutional and remedial, and such statutes should be given the widest possible application;<sup>9</sup> and it seems it does not apply to statutes changing the procedure.<sup>10</sup> Nor will it be allowed to modify the rule that the rights of an heir, distributee, devisee, or legatee depend on the law existing at the time of the intestate's or testator's death.<sup>11</sup>

1 McLellan v. Nelson, 27 Me. 129, 130. All "that have been or shall be"; Plumb v. Sawyer, 21 Conn. 351, 355. The English "Married Women's Property Act 1882," carefully does this.

2 Baugher v. Nelson, 9 Gill, 299, 303; 52 Am. Dec. 694.

3 Stewt. M. & D. §§ 128, 451; Cooley Const. Lim. 62, 370; 2 Bish. M. W. §§ 36, 51; Plumb v. Sawyer, 21 Conn. 351, 355; Noel v. Ewing, 9 Ind. 37, 55, 57; and see Tuller, 79 Ill. 99; Knoulton v. Redenbaugh, 40 Iowa, 114; Cumberland v. Washington, 10 Bush, 564; Rogers v. Greenbush, 58 Me. 395; Hopkins v. Frey, 2 Gill, 359, 365; Herbert v. Gray, 38 Md. 529, 531; Medford v. Learned, 16 Mass. 215, 217; Harrison v. Metz, 17 Mich. 377; Garrett v. Beaumont, 24 Miss. 377; State v. Auditor, 41 Mo. 25; Colony v. Dublin, 32 N. H. 432; Baldwin v. Newark, 38 N. J. L. 158; Drake v. Gilmore, 52 N. Y. 389; Merwin v. Ballard, 66 N. C. 398; Allbyer v. State, 10 Ohio St. 588; Haley v. Phila. 68 Pa. St. 45; 3 Am. Rep. 153; Graham, 13 Rich. 277; Clawson v. Hutchinson, 11 S. C. 323; Danville v. Pace, 25 Gratt. 1; 18 Am. Rep. 663; Sturgis v. Ifull 48 Vt. 302; State v. Atwood, 11 Wis. 422; Marsh v. Higgins, 9 Com. B. 551, 567; Moon v. Durden, 2 Ex. 22, 41-43.

4 Court must give statute constitutional meaning: *Burson*, 22 Pa. St. 164, 167; *Bradbury v. Wagenhorst*, 54 Pa. St. 150. See *post*, § 21.

5 Court will not construe statute against public policy: *Cuyahoga v. McCaughey*, 2 Ohio St. 152, 155; *Phillips v. Eyre*, Law R. 6 Q. B. 1, 23. See *post*, § 24.

6 See *Plumb v. Sawyer*, 21 Conn. 351, 355; *Noel v. Ewing*, 9 Ind. 37, 55-57; *Sutton v. Askew*, 66 N. C. 172, 176, 177; 8 Am. Rep. 500; *Moon v. Durden*, 2 Ex. 22, 38; *ante*, § 19.

7 *Meyers v. Gale*, 45 Mo. 416, 418; *post*, § 146-150.

8 *Moon v. Durden*, 2 Ex. 22, 33, 42.

9 See *Ironsides*, 31 Law J. Adm. 123, 131, 132.

10 See *Shouk v. Brown*, 61 Pa. St. 320, 327; *Wright v. Hale*, 6 Jur. N. S. 1212; 30 Law J. Ex. 40, 42, 43; *post*, § 321.

11 See *Cooley Const. Lim.* 359, 445, 446; 2 Bish. M. W. § 49; *Ware v. Owens*, 42 Ala. 212, 215; *Marshall v. King*, 24 Miss. 85, 90; *post*, § 22.

§ 21. **Retrospective statutes, validity of.**—Legislatures have power to pass retrospective laws unless prohibited by paramount law.<sup>1</sup> It has been said that when such laws take away valuable rights they conflict with the fundamental principles of common right and common reason and are therefore void;<sup>2</sup> but the better opinion seems to be that they are valid unless prohibited by the written law—by the Constitution;<sup>3</sup> so that, in England, the rule against retrospective laws is said to be merely a rule of construction.<sup>4</sup> The United States Constitution renders void all *ex post facto* laws,<sup>5</sup> but this provision applies only to criminal laws,<sup>6</sup> so that not even a legislative divorce,<sup>7</sup> or a law prohibiting marriage after divorce,<sup>8</sup> can be an *ex post facto* law. It also prohibits all laws impairing the obligation of contracts,<sup>9</sup> and this of course applies to contracts by or between husband and wife;<sup>10</sup> but it does not apply to marriage.<sup>11</sup> or marriage rights,<sup>12</sup> for marriage is not a contract, but a status of which marriage rights, liabilities, capacities, and disabilities are the conditions.<sup>13</sup> Some State Constitutions expressly forbid "retrospective laws,"<sup>14</sup> but it seems that this prohibition does not attach to all retrospective legislation,<sup>15</sup> but only to such as is deemed unjust,<sup>16</sup> or, perhaps, as divests vested rights.<sup>17</sup> In all

the State Constitutions,<sup>18</sup> and now in the United States Constitution,<sup>19</sup> it is provided that no one shall be deprived of his "property" without due process of law. But under this prohibition every right is not property; it applies not to inchoate and contingent rights,<sup>20</sup> but to vested rights only,<sup>21</sup> and gives rise to the familiar rule, "no statute can divest a vested right."<sup>22</sup> But all these constitutional provisions may be waived by a party intended to be protected,<sup>23</sup> even against creditors,<sup>24</sup> unless they have actual liens.<sup>25</sup> Thus, even if curtesy is a vested right which cannot be taken away,<sup>26</sup> a husband may assent to his wife's holding her property separately under a retrospective statute, and his creditors cannot attach his curtesy for his debts.<sup>27</sup> Such waiver will be presumed when the act results in the party's benefit,<sup>28</sup> and a court will declare the statute void only on the application of the party whose rights have been divested.<sup>29</sup>

1 *Watson v. Mercer*, 8 Peters, 88, 110; *infra*, n. 3.

2 *Fletcher v. Peck*, 6 Cranch, 87, 135, 136; *Wilkinson v. Leland*, 2 Peters, 627, 656; *Martin*, 13 Ark. 198, 206; *Goshen v. Stonington*, 4 Conn. 209, 225; 10 Am. Dec. 121; *Baughner v. Nelson*, 9 Gill, 299, 306; 52 Am. Dec. 694; *Thistle v. Frostburg*, 10 Md. 129, 144; *Medford v. Learned*, 16 Mass. 215, 217; *Williams v. Robinson*, 6 Cush. 333, 335; *Merrill v. Sherburne*, 1 N. H. 199, 213; 8 Am. Dec. 52; *Taylor v. Porter*, 4 Hill, 140, 149; 40 Am. Dec. 274; *Bloodgood v. Mohawk*, 18 Wend. 9, 56; 31 Am. Dec. 313; *Varick v. Smith*, 5 Paige, 137, 159; *Cochran v. Van Surlay*, 20 Wend. 365, 373; 32 Am. Dec. 570; *Day v. Savadge*, 110b. 85, 87; *Bonham*, 8 Coke, 114, 118; *London v. Wood*, 12 Mod. 669, 687.

3 *Watson v. Mercer*, 8 Peters, 88, 110; *Satterlee v. Matthewson*, 2 Peters, 413, 414; *Glenn*, 47 Ala. 204, 207, 218; *Elliott*, 38 Md. 357, 362; *Baughner v. Nelson*, 9 Gill, 299, 305, 307; 52 Am. Dec. 694; *Butler v. Palmer*, 1 Hill, 324, 329, 330; *Westervelt v. Gregg*, 12 N. Y. 202, 208, 209, 211.

4 *Ironsides*, 31 Law J. Adm. 129, 131; *Moon v. Durden*, 2 Ex. 22, 37, 42; *Marsh v. Higgins*, 9 Com. B. 551, 567, 569.

5 U. S. Const. art. 1, §§ 9, 10.

6 *Watson v. Mercer*, 8 Peters, 88, 110; *Society v. Wheeler*, 2 Gall. 104, 138; *Baughner v. Nelson*, 9 Gill, 299, 305; 52 Am. Dec. 694.

7 *Stewart M. & D.* §§ 194, 198, citing *Starr v. Pease*, 8 Conn. 541, 545, 546, and other cases.

8 *Elliott*, 38 Md. 357, 362; *Stewart M. & D.* §§ 200, 415, 432.

9 U. S. Const. art. 1, § 10.

- 10 *Moreau v. Detchemendy*, 18 Mo. 522, 527.
- 11 *Stewart M. & D.* § 194, citing *Pennoyer v. Neff*, 95 U. S. 714, 734, 735, and other cases.
- 12 *Moore v. Mayor*, 8 N. Y. 110, 113; 59 Am. Dec. 473; *post*, §§ 162, 247.
- 13 See fully *Stewart M. & D.* §§ 1, 16, 17.
- 14 *Society v. Wheeler*, 2 Gall. 105, 139; *Edwards v. Pope*, 4 Ill. 465, 469; *Whitman v. Hapgood*, 10 Mass. 437, 439; *Wourt v. Winnick*, 3 N. H. 473, 477; 14 Am. Dec. 384; *Cuyahoga v. McCaughy*, 2 Ohio St. 152, 155.
- 15 *Cooley Const. Lim.* 371, 462, n. 1; 1 Bish. M. & D. §§ 670-676.
- 16 See *Cuyahoga v. McCaughy*, 2 Ohio St. 152, 155; *Phillips v. Eyre*, Law R. 6 Q. B. 1, 21; *ante*, § 20.
- 17 *Cooley Const. Lim.* 371, 462, n. 1; cases cited *supra*, n. 14.
- 18 *Cooley Const. Lim.* 351, 435; see e. g., Md. Const. 1867, Decl. of Rights, art. 23.
- 19 Fourteenth Amend. § 1.
- 20 *Smith v. Packard*, 12 Wis. 371, 372.
- 21 *Westervelt v. Gregg*, 12 N. Y. 202, 208, 209, 211; as to what rights are vested: See *post*, § 22.
- 22 *Hinton, Phill. (N. C.)* 410, 415; cases cited *post*, § 22.
- 23 *Parsons v. Armor*, 3 Peters, 413, 425; 2 Bish. M. W. § 31; cases *infra*, notes 27-29.
- 24 *Meyers v. Gale*, 45 Mo. 416, 418; *Lefever v. Witmer*, 10 Pa. St. 505, 506.
- 25 *Phumb v. Sawyer*, 21 Conn. 351, 355; *Clark*, 20 Ohio St. 128, 136; *Lefever v. Witmer*, 10 Pa. St. 505, 506.
- 26 *Post*, § 162.
- 27 *Clark*, 20 Ohio St. 128, 136.
- 28 *Miller*, 16 Mass. 59, 61; *State v. Newark*, 27 N. J. L. 185, 197. See 2 Bish. M. W. § 35; *post*, § 22.
- 29 *Sticknoth*, 7 Nev. 223, 236.

§ 22. **Retrospective statutes, vested rights.**—A mere prior state of things is not a vested right.<sup>1</sup> All marriage rights are not vested; thus, a man's right to his wife is not, for she may be taken from him by legislative divorce;<sup>2</sup> and so conjugal rights, causes for divorce, personal incapacities of husband and wife, may be varied by the legislature at will.<sup>3</sup> The term "vested right" can in fact be predicated only of property not of status.<sup>4</sup> A vested right is an immediate right of present enjoyment or a present fixed right of future enjoyment;<sup>5</sup> other rights may be equally valuable, but they are not vested.<sup>6</sup> Property includes its increase,<sup>7</sup> but not

remedies.<sup>8</sup> Sometimes lien creditors of, or purchasers from, husband or wife, have vested rights which cannot be disturbed.<sup>9</sup> Rights arising out of marriage are or are not vested as follows :—

1. *Personal rights* arising from the status of husband and wife,<sup>10</sup> or the status of parent and child,<sup>11</sup> are not vested rights.

2. *A husband's rights* over his own property are vested. Thus, a statute cannot take away his right to convey property he possessed before its passage,<sup>12</sup> or give his wife dower in such lands,<sup>13</sup> or give his wife a part of such lands in lieu of dower.<sup>14</sup> A husband's freehold *jure uxoris* in his wife's realty is vested.<sup>15</sup> So, it is said, is his curtesy initiate,<sup>16</sup> but the contrary is the prevailing doctrine.<sup>17</sup> So is his common law right to his wife's personalty in possession,<sup>18</sup> and to money due for her services,<sup>19</sup> but not to her future labor.<sup>20</sup> His right to her *choses in action* is not vested, but contingent on his reducing them to possession,<sup>21</sup> though there are authorities to the contrary.<sup>22</sup> A husband's rights as heir or next of kin<sup>23</sup> are contingent on his wife's death, and may be modified any time before her death.<sup>24</sup>

3. *A wife's rights* on her own property are vested : thus, a statute may enable a wife to convey the reversion in her realty.<sup>25</sup> A wife's inchoate dower is not a vested right ;<sup>26</sup> it may be taken away any time before the husband's death ;<sup>27</sup> it may be taken for public uses without compensation to her ;<sup>28</sup> still, it has been held a vested right,<sup>29</sup> and a right arising from contract.<sup>30</sup> A wife's dower, therefore, depends on the law in force at the time of her husband's death ;<sup>31</sup> though of course, a statute giving dower cannot affect property of the husband already assigned<sup>32</sup> or seized in execution.<sup>33</sup> A wife's rights as heir or next of kin,<sup>34</sup> contingent on her

husband's death, may be modified any time before his death.<sup>35</sup>

4. *Husband's and wife's rights* in their estates by entireties are vested.<sup>36</sup>

1 Ironsides, 31 L. J. Adm. 129, 131.

2 Unless such divorce is specially prohibited: See Stewart M. & D. §§ 196, 197.

3 Because the rule "No statute can divest a vested right," is based on the clause "No one shall be deprived of property, etc.:" *Ante*, § 21.

4 See Stewart M. & D. §§ 194, 228, 451; *ante*, § 21.

5 2 Kent Com. 202; 2 Bish. M. W. § 38; Stewart & Car. Husb. & W. pp. 127, 128, as to his right as her trustee, see Carpenter v. Brown-ling, 98 Ill. 282.

6 See 2 Bish. M. W. §§ 45, 46.

7 George v. Ransom, 15 Cal. 322, 324.

8 See Reciprocity Bank, 21 Barb. 369, 382; Shonk v. Brown, 61 Pa. St. 320, 327; Tate v. Stooltzfoos, 16 Serg. & R. 35, 38; 16 Am. Dec. 546.

9 Consult Plumb v. Sawyer, 21 Conn. 351, 355; Bridgford v. Riddell, 55 Ill. 261, 266; Farrell v. Patterson, 43 Ill. 54, 58; McCafferty, 8 Blackf. 218, 220; Comly v. Strader, 1 Ind. 134, 135; Davis v. O'Ferrall, 4 Greene, 168, 358; Given v. Marr, 27 Me. 212, 222-224; Curtis v. Hobart, 41 Me. 230, 232; Davis v. Newton, 6 Met. 537; Coombs v. Read, 16 Gray, 271, 273; Meyers v. Gale, 45 Mo. 416, 418; Cunningham v. Gray, 20 Mo. 170, 172, 173; Clark, 20 Ohio St. 128, 136; Lefever v. Witmer, 10 Pa. St. 505, 506; Gillespie v. Warford, 2 Col. 632, 644; Green v. Otte, 1 Sim. 250, 252.

10 *Supra*, notes 1-4.

11 U. S. v. Balnbridge, 1 Mason, 71, 80; People v. Turner, 55 Ill. 280, 284, 285; 8 Am. Rep. 645; State v. Clotter, 33 Ind. 409, 412; Bennet, 13 N. J. Eq. 114, 118.

12 Noel v. Ewing, 9 Ind. 37, 55, 57, 62, 63.

13 Sutton v. Askew, 66 N. C. 172, 177; 8 Am. Rep. 500.

14 Noel v. Ewing, 9 Ind. 37, 57, 61.

15 Rose v. Sanderson, 38 Ill. 247, 250; Beale v. Knowles, 45 Me. 479, 480; Meyers v. Gale, 45 Mo. 416, 418; Prall v. Smith, 31 N. J. L. 244, 246; Lefever v. Witmer, 10 Pa. St. 505; Burson, 22 Pa. St. 164, 167; Mellinger v. Bausman, 45 Pa. St. 522, 529.

16 2 Bish. M. W. § 43; Mellinger v. Bausman, 45 Pa. St. 522, 523; Winne. 1 Lans. 508, 513 (reversed 2 Lans. 21).

17 Hathon v. Lyon, 2 Mich. 93, 95; Winne, 2 Lans. 21, 26; Sharpless v. West, 1 Grant, 257, 260; Porter, 27 Gratt. 599, 606; Stewart M. & D. §§ 443, 451.

18 Farrell v. Patterson 43 Ill. 52, 53; Buchanan v. Lee, 69 Ind. 117; Sharp v. Maxwell, 30 Miss. 589, 591; Boyce v. Cayce, 17 Mo. 47, 49; Ryder v. Hulse, 33 Barb. 264, 270; Quigley v. Graham, 18 Ohio St. 42, 45; Mellinger v. Bausman, 45 Pa. St. 522, 529; Hawkins v. Lee, 22 Tex. 544, 547, 548.

19 See Hinman v. Parkis, 33 Conn. 188, 197; Henderson v. War-mack, 27 Miss. 830, 835; Brackett v. Drew, 20 N. H. 441, 443; Filer v.



New York, 49 N. Y. 47, 56; 10 Am. Rep. 327; Raybold, 20 Pa. St. 233, 311.

20 2 Bish. M. W. § 51. This is a matter of status, not a property right.

21 Clark v. McCreary, 20 Miss. 347, 354; Duncan v. Johnson, 23 Miss. 130, 132; Henry v. Dilley, 25 N. J. L. 302, 304, 305, 307; Goodyear v. Rumbaugh, 13 Pa. St. 480, 481; Mellinger v. Bausman, 45 Pa. St. 522, 529; McVaugh, 10 Phila. 457, 458; 2 Bish. M. W. §§ 45, 46; *post*, § 165. See Archer v. Guill, 67 Ga. 195.

22 Jackson v. Sublett, 10 Mon. B. 467, 470; Dunn v. Sargent, 101 Mass. 336, 339; Dash v. Van Kleeck, 7 Johns. 477; 5 Am. Dec. 291; Norris v. Beyea, 13 N. Y. 273, 283; Westervelt v. Gregg, 12 N. Y. 202, 208, 209; Ryder v. Hulse, 24 N. Y. 372; O'Connor v. Harris, 81 N. C. 279, 285; *post*, § 165.

23 Stewart M. & D. § 457.

24 Noel v. Ewing, 9 Ind. 37, 60; Hill v. Chambers, 30 Mich. 422, 427; Marshall v. King, 24 Miss. 85, 90; Sleight v. Read, 18 Barb. 159, 164, 165; Melizet, 17 Pa. St. 449, 454; 55 Am. Dec. 577; Cooley Const. Lim. (359) 445, 446; 2 Bish. M. W. § 49.

25 Farr v. Sherman, 11 Mich. 33, 34; Tate v. Stooltzfoos, 16 Serg. & R. 35, 36; 16 Am. Dec. 546.

26 Powell v. Monson, 3 Mason. 347, 355; Ware v. Owens, 42 Ala. 212, 215; Boyd v. Harrison, 36 Ala. 533; Noel v. Ewing, 9 Ind. 37, 55, 57, 63; Strong v. Clem, 12 Ind. 37, 40; Frantz v. Harrow, 13 Ind. 507; Lucas v. Sawyer, 17 Iowa, 517, 521; Yancy v. Smith, 2 Met. (Ky.) 408, 411; Barbour, 46 Me. 9, 14; Reiff v. Horst, 55 Md. 42, 45; Magee v. Young, 40 Miss. 164, 169; Merrill v. Sherburne, 1 N. H. 199, 204; 8 Am. Dec. 52; Moore v. Mayor, 4 Sand. 456; 8 N. Y. 110, 113; Norwood v. Marrow, 4 Dev. & B. 442, 450; Philips v. Disney, 16 Ohio, 639, 654; Weaver v. Gregg, 6 Ohio St. 547; Melizet, 17 Pa. St. 449, 455; 55 Am. Dec. 578; Stewart M. & D. § 451; *post*, § 262.

27 Boyd v. Harrison, 36 Ala. 533; Lucas v. Sawyer, 17 Iowa, 517, 521; Philips v. Disney, 16 Ohio, 639, 654.

28 Moore v. Mayor, 4 Sand. 456; 8 N. Y. 110, 112.

29 Royston, 21 Ga. 161, 172; Russell v. Rumsey, 35 Ill. 362, 372; Dunn v. Sargeant, 101 Mass. 336, 340; Jackson v. Edwards, 7 Paige, 391; 22 Wend. 498, 513, 519; Lawrence v. Miller, 1 Sand. 516; 2 Comst. 245; Sutton v. Askew, 66 N. C. 172, 177; 8 Am. Rep. 500.

30 Johnson v. Vandyke, 6 McLean, 422, 423. *Contra*, Boyd v. Harrison, 36 Ala. 533; Norwood v. Marrow, 4 Dev. & B. 442, 450.

31 Boyd v. Harrison, 36 Ala. 533; *supra*, n. 27.

32 Davis v. O'Ferrall, 4 Greene, 168, 358; Strong v. Clem, 12 Ind. 37, 40, 41; Stewart M. & D. § 451; *supra*, n. 9.

33 Kennerly v. Missouri, 11 Mo. 204, 206; *supra*, n. 9.

34 Stewart M. & D. § 457.

35 Lucas v. Sawyer, 17 Iowa, 517, 521; *supra*, notes 24, 27.

36 Almond v. Bonnell, 76 Ill. 536, 540, 541.

§ 23. Retrospective statutes — Curative acts. — The legislature may, it seems, without infringing the various constitutional prohibitions,<sup>1</sup> pass acts curing defects in

the formation of a marriage,<sup>2</sup> and thus legitimate children,<sup>3</sup> and give marriage property rights from the beginning.<sup>4</sup> So it may by retrospective laws cure and confirm conveyances defectively acknowledged or executed;<sup>5</sup> but whether this rule applies to deeds of married women<sup>6</sup> is disputed.<sup>7</sup> On the one hand, it is said that a married woman's deed is but an execution of a power,<sup>8</sup> and if defective is not voidable but is absolutely void;<sup>9</sup> that an act making such a deed valid would simply divest her of her property;<sup>10</sup> and that such acts are therefore<sup>11</sup> void.<sup>12</sup> On the other hand, it is said that a law which carries out the intent of a party cannot be said to divest her of her rights;<sup>13</sup> that one who in good faith executes a defective deed assents beforehand to its being ratified, and waives, as she can, the constitutional protection;<sup>15</sup> and that acts ratifying such deeds are valid,<sup>16</sup> except as against creditors with liens or subsequent purchasers.<sup>17</sup> If a married woman's deed is good in equity, it can, of course, be made good at law.<sup>18</sup> Thus, in Maryland an act curing a defective deed by husband and wife of the husband's land was held to make the deed valid as to the husband, but not to bar the wife's dower;<sup>19</sup> while in California a married woman's void power of attorney was cured and the conveyance thereunder made valid.<sup>20</sup> But the legislature cannot divest estates by correcting mistakes; cannot, for example, make a husband's or wife's will valid after his or her death.<sup>21</sup> When a law provides that marriage and recognition by the father of an illegitimate child shall legitimize such child, the child may be born before, but the recognition must take place after, the passage of the law.<sup>22</sup>

1 *Ante*, § 21.

2 Stewart M. & D. § 47.

3 Harrison, 22 Md. 468, 493; Stevenson's Heirs v. Sullivan, 5 Wheat. 207, 259; Rice v. Eford, 3 Hen. & M. 225.

4 *Goshen v. Stonington*, 4 Conn. 202, 224; 19 Am. Dec. 121; cases cited *Stewart M. & D.* § 47.

5 *Grove v. Todd*, 41 Md. 633, 641; 20 Am. Rep. 73; *Journey v. Gibson*, 53 Pa. St. 57, 60.

6 Discussed, *post*, §§ 233, 234.

7 See *Cooley Const. Lim.* 376, 379, 463, 472; cases cited *infra*.

8 See *post*, § 205.

9 *Grove v. Todd*, 41 Md. 633, 641; 20 Am. Rep. 76; *post*, §§ 236, 237, 270.

10 *Alabama v. Boykin*, 38 Ala. 510, 513; *Russell v. Rumsey*, 35 Ill. 362, 372-374; *Grove v. Todd*, 41 Md. 633, 641; 20 Am. Rep. 76; *Shonk v. Brown*, 61 Pa. St. 320, 323.

11 *Ante*, § 22.

12 *Alabama v. Boykin*, 38 Ala. 510; *Russell v. Rumsey*, 35 Ill. 362, 372; *Lane v. Soulard*, 15 Ill. 124; *Grove v. Todd*, 41 Md. 633, 641; 20 Am. Rep. 76; *Shonk v. Brown*, 61 Pa. St. 320, 323; *Orton v. Noonan*, 23 Wis. 102, 104.

13 *State v. Newark*, 27 N. J. L. 185, 197; *Cooley Const. Lim.* 378, 471, 472.

14 *Ante*, § 21.

15 *Dentzel v. Waldie*, 30 Cal. 138, 145.

16 *Randall v. Kreiger*, 23 Wall. 137, 149; reverse *Watson v. Mercer*, 1 Watts, 355; 8 Peters, 88, 110; *Dentzel v. Waldie*, 30 Cal. 138, 145; *Dow v. Gould*, 31 Cal. 674, 693; *Chesnut v. Shane*, 16 Ohio St. 599, 609, 610; *Tate v. Stootzfoos*, 16 Serg. & R. 35, 37, 38; 16 Am. Dec. 546; *Barnet*, 15 Serg. & R. 72, 73; 16 Am. Dec. 516; *Underwood v. Lilly*, 10 Serg. & R. 101.

17 *Cooley Const. Lim.* 379, 472; *ante*, §§ 21, 22.

18 *Chesnut v. Shane*, 16 Ohio St. 599, 609, 610; overruling *Good v. Zercher*, 12 Ohio, 364, 368. See *supra*, note 16.

19 *Grove v. Todd*, 41 Md. 633, 641; 20 Am. Rep. 76.

20 *Dentzel v. Waldie*, 30 Cal. 138, 145. See *Randall v. Kreiger*, 23 Wall. 137, 149.

21 *Alter*, 67 Pa. St. 341, 345; 5 Am. Rep. 453.

22 *Stevenson v. Sullivan*, 5 Wheat. 257, 259; *Rice v. Efford*, 3 Hen. & M. 225.

## ARTICLE IV.—HOME AND FOREIGN LAW.

§ 24. Foreign law recognized by comity.

§ 25. Foreign law must be proved.

§ 26. Nature of conflict of laws.

§ 27. Story's rules.

§ 28. Effect of marriage settlement.

§ 29. Matrimonial domicile defined.

§ 30. *Lex domicilii*—status.

§ 31. *Lex domicilii*—movables.

§ 32. Effect of change of domicile.

§ 33. *Lex rei sitæ*—immovables.

§ 34. *Lex loci actus*—validity of acts.

§ 35. *Lex fori*—procedure.

§ 36. Wills of married women.

§ 37. Contracts of married women.

§ 24. Foreign law recognized by comity. — Every State has the right to itself determine the condition and rights of persons and things within its territory, and it is only by comity that it allows such condition and rights to be affected by foreign law.<sup>1</sup> Therefore a court will never enforce a foreign law which is inconsistent with the fundamental policy or institutions of its own State.<sup>2</sup> In some States the statute law provides in what cases foreign law shall be administered.<sup>3</sup> Since the parties may regulate their property rights as they please by marriage settlement,<sup>4</sup> courts will rarely refuse to enforce such rights as regulated by foreign law.<sup>5</sup> So it can hardly be said that a statute giving a married woman power to contract fully is inconsistent with any fundamental policy.<sup>6</sup>

1 Minor v. Cardwell, 37 Mo. 350, 354.

2 Sidney v. White, 12 Ala. 723; Sanford v. Thompson, 18 Ga. 554, 561; Hughes v. Klingender, 14 La. An. 845; Wilson v. Carson, 12 Md. 51, 75, 76; Prentiss v. Savage, 13 Mass. 20, 21; Ingraham v. Gover, 13 Mass. 116; 7 Am. Dec. 132; Tappan v. Poor, 15 Mass. 411, 422; Mahorner v. Hove, 9 Smedes & M. 217, 274; Holmes v. Reynolds, 55 Vt. 39, 41.

3 Castro v. Illies, 22 Tex. 479, 497.

4 Stewart M. & D. §§ 32-43; *post*, § 23.

5 2 Bish. M. W. § 577; Beard v. Bayne, 7 Mon. B. 133, 141; Schefferling v. Huffman, 4 Ohio St. 241, 259.

6 Wright v. Remington, 41 N. J. L. 43, 51, 52; Holmes v. Reynolds 55 Vt. 39, 42.

§ 25. Foreign law must be proved. — Courts do not take judicial notice of foreign law, but such law must be proved;<sup>1</sup> otherwise the law of the *forum*<sup>2</sup> or the common law<sup>3</sup> is applied.

1 See fully Stewart M. & D. § 119.

2 Drake v. Glover, 30 Ala. 332, 333; Hydrick v. Burke, 30 Ark. 124; Worthington v. Hanna, 23 Mich. 530, 534.

3 Lichtenberger v. Graham, 50 Ind. 233; Stokes v. Macken, 62 Barb. 145, 146; King v. O'Brien, 33 N. Y. Super. 49, 54.

§ 26. Nature of conflict of laws. — A man domiciled in Maryland and a woman domiciled in New York may marry in Pennsylvania intending to live in Delaware:

they may have property in Illinois and Texas; they may move to California and there acquire more property; they may make a contract in Maine and sue or be sued on it in Massachusetts. Since the law in each of these States differs materially from that in each of the others, it becomes of the first importance in a particular case to know what law applies. As a general rule the law of the domicile of the wife before marriage,<sup>1</sup> of the place of the marriage,<sup>2</sup> and of the place of temporary residence,<sup>3</sup> is immaterial; and the law of the husband's actual<sup>4</sup> or intended<sup>5</sup> domicile at the time of the marriage, or subsequently acquired domicile<sup>6</sup> settles the status of the parties<sup>7</sup> and their children,<sup>8</sup> and their rights over movables;<sup>9</sup> while the law of the State where it is governs immovable property,<sup>10</sup> the law of the place when an act is done determines the validity of the act,<sup>11</sup> and the law of the State where the suit is brought regulates all matters of form and procedure.<sup>12</sup> But a marriage settlement may determine what law shall apply as to all property rights.<sup>13</sup>

1 Dicey Dom. 268.

2 Land, 14 Smedes & M. 99, 100; *State v. Barrow*, 14 Tex. 178, 186.

3 *Le Breton v. Nonchet*, 1 Mart. (La.) 60, 66, 71, 73; 5 Am. Dec. 736.

4 Dicey Dom. 263, *post*, § 27.

5 Glenn, 47 Ala. 204, 207; *post*, § 29.

6 Fuss, 24 Wis. 256, 263, 264; 1 Am. Rep. 180; *post*, §§ 29, 32.

7 *Dow v. Gould*, 31 Cal. 629, 651, 652; *post*, § 30.

8 Ross, 129 Mass. 243, 247; *post*, § 30.

9 Kraemer, 52 Cal. 302, 305; *post*, § 31.

10 *Vertner v. Humphreys*, 14 Smedes & M. 130, 142; *post*, § 33.

11 *Milliken v. Pratt*, 125 Mass. 374, 381, 332; 23 Am. Rep. 241; *post*, § 34.

12 *Stoneman v. Erie*, 52 N. Y. 249, 432; *post*, § 35.

13 *Stewart M. & D.* §§ 32-43; *Besse v. Pellochoux* 73 Ill. 255, 289, 290; 24 Am. Rep. 242; *post*, § 28.

§ 27. *Story's rules.*—So many cases<sup>1</sup> refer to Story's rules<sup>2</sup> that these are given here in full:—

1. Where parties are married in a foreign country,

and there is an express contract<sup>3</sup> respecting their rights and property, present and future, it will be held equally valid everywhere, unless under the circumstances it stands prohibited by the laws of the country where it is sought to be enforced.<sup>4</sup> It will act directly on movable property everywhere.<sup>5</sup> But as to immovable property in a foreign territory, it will at most confer only a right of action, to be enforced according to the jurisdiction *rei sitæ*.<sup>6</sup>

2. Where such express contract<sup>7</sup> applies in terms or intent only to present property, and there is a change of domicile, the law of the actual domicile will govern the parties as to all future acquisitions.<sup>8</sup>

3. Where there is no express contract, the law of the matrimonial domicile will govern as to all the rights of the parties to their present property in that place, and as to all personal property everywhere, upon the principle that movables have no *situs*, or rather, that they accompany the person everywhere.<sup>9</sup> As to immovable property the law *rei sitæ* will prevail.<sup>10</sup>

4. Where there is no change of domicile the same rule will apply to future acquisitions as to present property.<sup>11</sup>

5. But where there is a change of domicile, the law of the actual domicile and not of the matrimonial domicile will govern as to all future acquisitions of movable property,<sup>12</sup> and to all immovable property the law *rei sitæ*.<sup>13</sup>

[6. The real matrimonial domicile is the place where at the time of marriage the parties intend to fix their abode, such intention having been carried out.<sup>14</sup>] These rules apply only to property rights.

1 See e. g., *Kraemer*, 52 Cal. 392, 395; *Besse v. Pellochoux*, 73 Ill. 25, 289, 290; 24 Am. Rep. 242; *Townes v. Durbin*, 3 Met. (Ky.) 352, 353, 357; *Newcomer v. Orem*, 2 Md. 257, 305; *Ordronaux v. Roy*, 2 Sarrl. Ch. 33, 45; *Castro v. Illies*, 22 Tex. 479, 497, 498; *Fuss*, 24 Wis. 256, 263, 264; 1 Am. Rep. 180.

2 Story Conf. Laws, §§ 184-188.

- 3 Discussed in Stewart M. & D. § 42.
- 4 Stewart M. & D. § 42; *ante*, § 24.
- 5 Fuss, 24 Wis. 256, 263, 264; 1 Am. Rep. 180. Consult *post*, § 28.
- 6 Castro v. Illies, 22 Tex. 479, 477, 498. Consult *post*, §§ 28, 35.
- 7 Stewart M. & D. § 42. Consult *post*, § 23.
- 8 Besse v. Pellochoux, 73 Ill. 285, 289; 24 Am. Rep. 242. Consult *post*, § 24.
- 9 Mason v. Fuller, 36 Conn. 160, 162; *post*, §§ 31, 32.
- 10 Frierson v. Williams, 57 Miss. 451, 462; *post*, § 33.
- 11 Minor v. Cardwell, 37 Mo. 350, 356.
- 12 Fuss, 24 Wis. 256, 263, 264; 1 Am. Rep. 180; *post*, § 32.
- 13 McDaniel v. Grace, 15 Ark. 465, 478; *post*, §§ 32, 33.
- 14 See Story Conf. Laws, §§ 183, 199; LeBreton v. Miles, 3 Paige. 261, 265; *post*, § 29.

§ 23. **Effect of marriage settlement.**—Marriage settlements have no effect upon the *status* of the parties,<sup>1</sup> but determine only all or a part of their property rights.<sup>2</sup> To effect *immovable* property settlement must be in matter and form in accordance with the *lex rei sitæ*.<sup>3</sup> But if valid in the State where it is made, it is valid everywhere, and regulates of the *movables* designated no matter where they are situate,<sup>4</sup> unless, of course, it is prohibited in the State where it is sought to be enforced.<sup>5</sup> It will be construed with reference to the law of the intended matrimonial domicile at the time of the marriage, if such intention has been carried out;<sup>6</sup> if not, the actual domicile of the husband at such time;<sup>7</sup> and such is the rule for determining whether it includes subsequent acquisitions.<sup>8</sup> The effect and construction of a marriage settlement is not varied by a subsequent change of domicile.<sup>9</sup> The parties may make it part of the contract that their rights shall be subject to some other law, in which case their rights will be determined with reference to such other law.<sup>10</sup> All property rights not included within a settlement depend upon the same law as if there were no settlement.<sup>11</sup>

1 Stewart M. & D. §§ 32, 181.

2 Diney Dom. p. 273, citing Story Conf. Laws, § 143; Westlake Conf. Laws, § 271; Ferguson v. Turst, Prec. Ch. 207; Anstruther v.

Adair, 2 Mylne & K. 513; Williams 3 Beav. 547; *Este v. Smyth*, 18 Beav. 112; 23 Law J. Ch. 705; *Duncan v. Cannan*, 18 Beav. 128; 23 Law J. Ch. 265; *Byam*, 19 Beav. 58; *Watts v. Shrimpton*, 21 Beav. 97; *Van Grutten v. Digby*, 31 Beav. 561; *Bank v. Cuthbert*, 1 Rose, 462; *McCormick v. Garnett*, 5 De Gex, M. & G. 278; considered fully in *Stewart M. & D* §§ 32-43, 181-191.

3 *Besse v. Pellochoux*, 73 Ill. 285, 289, 290; 24 Am. Dec. 242; *ante*, § 27; *post*, § 33.

4 *Stewart M. & D.* § 42; *ante*, § 27.

5 *Ante*, §§ 24, 27.

6 *Davenport v. Karne*, 70 Ill. 465; *Le Breton v. Miles*, 8 Paige, 261, 265; *Duncan v. Cannan*, 18 Beav. 128; 23 Law J. Ch. 265; *Dacey Dom.* pp. 273, 274; *Stewart M. & D.* § 42. Consult *post*, § 29.

7 See *State v. Barrow*, 14 Tex. 178, 186. Consult *post*, § 29.

8 *Dacey Dom.* p. 275; *ante*, § 27. Consult *post*, § 29.

9 *Dacey Dom.* p. 276, citing *Duncan v. Cannan*, 18 Beav. 128; 23 Law J. Ch. 265.

10 *Dacey Dom.* p. 275, citing *Este v. Smyth*, 23 Law J. Ch. 705; 18 Beav. 112.

11 *Dacey Dom.* p. 275, citing 4 *Phillimore Inter. Law*, § 476; *Hoare v. Hornby*, 2 *Yonge & C.* 121; *Anstruther v. Adair*, 2 *Mylne & K.* 513; *Duncan v. Cannan*, 18 Beav. 128; 23 Law J. Ch. 265; see *ante*, § 27.

§ 29. **Matrimonial domicile defined.**—The term “matrimonial domicile” used in this article may mean: (1) The actual home of the man at the time of the marriage; (2) the intended joint home of the man and woman at the time of the marriage; (3) the home acquired by the husband subsequent to the marriage.

1. *Actual domicile.* One’s domicile is one’s permanent home.<sup>1</sup> The permanent home of a husband and wife—of the family—is their matrimonial domicile.<sup>2</sup> The husband’s domicile is in law the domicile of his wife;<sup>3</sup> the husband has the right to fix the family home;<sup>4</sup> naturally, then, the husband’s home at the time of the marriage usually becomes the home of his wife and family. Therefore, when the *lex domicilii*<sup>5</sup> is applied to determine the condition and rights of husband and wife, it is generally the law of the actual domicile of the husband at the time of the marriage.<sup>6</sup> Thus A, a man domiciled in England, marries (anywhere) B domiciled in France. The rights of the parties to movable property held by



either of them are regulated by the law of England, the man's domicile, just as if B also had been domiciled there.<sup>7</sup>

2. *Intended domicile.* If at the time of their marriage both parties intend to at once make their common home away from the husband's actual domicile,<sup>8</sup> and this intention they forthwith after their marriage carry out,<sup>9</sup> this home is deemed their original matrimonial domicile, and the law of this place is applied in all cases in which that of the husband's actual domicile would otherwise have been.<sup>10</sup> Thus, A and B, domiciled in Maryland, marry with the intention of at once settling in Illinois, which they do; their respective rights to their movables owned at the time of their marriage are regulated by Illinois law.<sup>11</sup>

3. *New domicile.* A husband and wife who have a matrimonial domicile according to one of the above rules, may change their home (this being within the discretion of the husband<sup>12</sup>) and acquire a new matrimonial domicile, the law of which will regulate some of their rights dependant upon domicile while the law of the old domicile will continue to regulate the rest.<sup>13</sup> Thus, A, a man, domiciled in Missouri, marries B, domiciled in Michigan. Whilst in Missouri they make two thousand dollars, in trade. They afterwards settle in California and while there domiciled make one thousand dollars. Their rights over the two thousand dollars are governed by Missouri law but their rights over the one thousand dollars are governed by California law.<sup>14</sup>

1 Discussed in Stewart M. & D. §§ 222, 223; Dicey Dom. pp. 42, 44, 331.

2 See Dicey Dom. p. 269; 1 Bish. M. & D. § 404.

3 Stewart M. & D. § 221; Cheever v. Wilson, 8 Wall. 108, 124.

4 Stewart M. & D. § 253; Hair, 10 Rich Eq. 163, 175.

5 See *post*, §§ 30, 31, 34, 36, 27.

6 *Hayden v. Nutt*, 4 La. An. 65, 67, 68; *State v. Barrow*, 14 Tex. 178, 186; *Dicey Dom.* p. 269; cases cited *infra*.

7 *Dicey Dom.* p. 269. As to movables, see *post*, § 31.

8 *Hayden v. Nutt*, 4 La. An. 66, 67, 68.

9 *Hayden v. Nutt*, 4 La. An. 66, 67; *State v. Barrow*, 14 Tex. 178, 186; *Dicey Dom.* p. 270.

10 See *Glenn*, 17 Ala. 204, 207; *Mason v. Fuller*, 36 Conn. 160, 162; *Davenport v. Karne*, 70 Ill. 465; *Arendell*, 10 La. An. 566, 567; *Hayden v. Nutt*, 4 La. An. 66, 67; *Mason v. Homer*, 105 Mass. 116, 119; *Verringer v. Humphreys*, 11 Smedes & M. 130, 142; *Land*, 14 Smedes & M. 99, 100; *LeBreton v. Miles*, 8 Paige 261, 265; *State v. Barrow*, 14 Tex. 178, 186. Not settled in England: *Dicey Dom.* p. 269.

11 See *State v. Barrow*, 14 Tex. 178, 186.

12 *Stewart M. & D.* §§ 221, 253.

13 See *Kendall v. Coons*, 1 Bush, 530, 531; *Gidney v. Moore*, 86 N. C. 481, 491; *Fuss*, 24 Wis. 256, 263, 264; 1 Am. Rep. 180; *post*, § 32.

14 *Dicey Dom.* pp. 270, 272; *post*, §§ 31, 32.

§ 30. *Lex domicilii*—*Status*.—*Status* generally depends upon domicile.<sup>1</sup>

1. The status of husband and wife depends on the law of the matrimonial domicile.<sup>2</sup> Thus, no state but that of the matrimonial, or of the wife's separate domicile, can change (by divorce) the status of a husband or a wife;<sup>3</sup> a husband's marital rights depend on the law of the matrimonial domicile;<sup>4</sup> as does his liability to be sued for his wife's antenuptial debts.<sup>5</sup> But a husband's right to correct and restrain his wife is rather a matter of police regulation, and depends on the law of the forum.<sup>6</sup>

2. A married woman's capacities or disabilities are determined by the law of the place where the act is done,<sup>7</sup> though logically they should depend on the law of the matrimonial domicile.<sup>8</sup> Thus, generally the validity of a married woman's contract depends on the law of the place where it is made,<sup>9</sup> but the validity of her will on the law of her domicile.<sup>10</sup>

3. The status of parent and child depends on the law of the parent's domicile.<sup>11</sup> But a parent's right to chastise a child is rather a matter of police regulation, and

depends on the law of the forum,<sup>12</sup> as does a parent's liability in bastardy proceedings.<sup>13</sup>

4. Legitimacy depends on domicile.<sup>14</sup> The legitimacy of a child born or begotten during the existence of an alleged marriage between its father and mother depends on the validity of their marriage.<sup>15</sup> If born out of wedlock, the law of the father's domicile at the time of its birth determines whether the child becomes, or may become, legitimate in consequence of the subsequent marriage of its parents.<sup>16</sup> But a child may be recognized as legitimate and yet be held incapable of inheriting real estate under statutes of inheritance.<sup>17</sup> So a special act of a legislature declaring a child legitimate has no extraterritorial effect.<sup>18</sup> But in determining the legitimacy of a child born before the marriage of its parents, the domicile of the mother,<sup>19</sup> the place of the child's birth,<sup>20</sup> and the place of the celebration or consummation of the marriage<sup>21</sup> are immaterial.

1 Stewart M. & D. §§ 113-117, 220; Dicey Dom. pp. 159-168. Unless it is a penal status, or is contrary to the policy of the law of the forum; Dicey Dom. p. 161; see Westlake Inter. L. §§ 397-407; Story Conf. L. §§ 50-106; 4 Phillim. Inter. L. §§ 365, 389, 522-564; Wharton Conf. L. §§ 84-126; Ross, 129 Mass. 243, 246, 247.

2 De Greuchy v. Wills, Law R. 4 C. P. D. 362, 366; Dow v. Gould 31 Cal. 629, 651, 652; Kelly v. Davis, 28 La. An. 773, 774; Land, 14 Smedes & M. 99, 100. But see Bank v. Williams, 46 Miss. 618, 624; 12 Am. Rep. 319.

3 Stewart M. & D. §§ 201, 212-223.

4 Land, 14 Smedes & M. 99, 100.

5 De Greuchy v. Wills, Law R. 4 C. P. D. 362, 364, 366.

6 Dicey Dom. p. 193; citing 4 Phillim. Inter. L. § 486; 1 Bish. M. & D. § 407; Wharton Conf. L. § 120; Polydore v. Prince, Ware, 402.

7 Milliken v. Pratt, 125 Mass. 374, 381, 382; 28 Am. Rep. 241; Graham v. First National Bank of Norfolk, 84 N. Y. 393, 402; 38 Am. Rep. 528.

8 Because it is a part of her status: See Story Conf. L. § 136 p. 233; Dicey Dom. pp. 153-168.

9 Post, § 37.

10 Post, § 36.

11 See Gambier, 7 Sim. 263, 270.

12 Dicey Dom. p. 169; Sherwood v. Ray, 1 Moore P. C. C. 353, 398; Johnstone v. Beattie, 10 Clark & F. 42, 114, 115; Nugent v. Vetzera, Law R. 2 Eq. 704.

13 *Kolbe v. People*, 85 Ill. 336, 377; *Duffies v. State*, 7 Wis. 672, 673. But see *Graham v. Monsergh*, 22 Vt. 543, 545; *Egleson v. Battles*, 26 Vt. 548, 551.

14 *Ross*, 129 Mass. 243, 247; see *Harvey v. Ball*, 32 Ind. 93, 99; *Scott v. Key*, 11 La. An. 232, 237; *Smith v. Kelly*, 23 Miss. 167, 170; 55 Am. Dec. 87; *Don*, 4 Drew. 194, 198; *Skottowe v. Young*, Law R. 11 Eq. 474, 477; *Shaw v. Gould*, Law R. 3 H. L. 55, 70.

15 *Dicey Dom.* p. 181. See *Stewart M. & D.* §§ 45, 106-121.

16 *Dicey Dom.* p. 181; citing *Udny v. Udny*, Law R. 1 S. & D. App. 441; *Re Wright's Trusts*, 25 Law J. Ch. 621; 2 Kay & J. 595; see *Don*, 4 Drew. 194, 197; *Doe v. Vardill*, 5 Barn. & C. 438, 455; 11 Eng. C. L. 263; 7 Clark & F. 895, 898, 925; *Shaw v. Gould*, Law R. 3 H. L. 55, 70; *Skottowe v. Young*, Law R. 11 Eq. 474, 477; *Lingen*, 45 Ala. 411, 414; *Scott v. Key*, 11 La. An. 232, 237; *Barnum*, 42 Md. 251, 305, 307, 325; *Ross*, 129 Mass. 243, 246-256; *Smith v. Kelly*, 23 Miss. 167, 170; 55 Am. Dec. 87; *Smith v. Derr*, 34 Pa. St. 126, 128; *Honey v. Clark*, 37 Tex. 686.

17 *Don*, 4 Drew. 194, 197; 27 Law J. Ch. 98, 100; *Skottowe v. Young*, Law R. 11 Eq. 474, 477; *Birtwhistle v. Vardill*, 2 Clark & F. 571, 573, 577; *Doe v. Vardill*, 5 Barn. & C. 435, 451, 455; *Shaw v. Gould*, Law R. 3 H. L. 55, 70; *Lingen*, 45 Ala. 411, 414, 415; *Harvey v. Ball*, 32 Ind. 93, 99; *Smith v. Derr*, 34 Pa. St. 126, 128. *Contra*, *Ross*, 129 Mass. 243, 250; *Scott v. Key*, 11 La. An. 232, 237.

18 *Barnum*, 42 Md. 251, 305, 307, 325. *Contra*, *Scott v. Key*, 11 La. An. 232, 237.

19 *Wright*, 2 Kay & J. 595, 610; *Munro*, 7 Clark & F. 842.

20 *Wright*, 2 Kay & J. 595, 610, 611; *Udny v. Udny*, Law R. 1 S. & D. App. 441; *Munro*, 7 Clark & F. 842; *Dicey Dom.* p. 185.

21 *Munro*, 7 Clark & F. 842; *Dicey Dom.* p. 186.

§ 31. *Lex domicilii*—Movables.—The mutual rights of husband and wife to each others movables are determined by the law of the matrimonial domicile,<sup>1</sup> at the time of the marriage, if the movables are owned at such time,<sup>2</sup> and if they are subsequently acquired, at the time of such acquisition.<sup>3</sup> Thus, the respective rights of husband and wife domiciled in New York to the wife's interest in an intestate's personalty distributed in England depend on New York law.<sup>4</sup> So when the Louisiana real estate of a married woman who is domiciled with her husband in Maryland is converted into personalty, the husband's marriage rights on such personalty attach according to Maryland law.<sup>5</sup> So, A and B have their matrimonial domicile in England, and there make two thousand dollars in trade. They then move permanently to Virginia where they make one

thousand dollars in trade. Their respective rights to the two thousand dollars are governed by English law,<sup>6</sup> but, to the one thousand dollars by Virginia law.<sup>7</sup> Whether property is movable or immovable depends on the law of the place where it is found,<sup>8</sup> though there is authority to the effect that it depends on the domicile of the claimants.<sup>9</sup> Still courts will sometimes refuse to apply any but the local law.<sup>10</sup> The rights of the survivor in the movables of the deceased depend upon law of the matrimonial domicile at the time of the deceased's death.<sup>11</sup>

1 Actual or intended: *Ante*, § 29. Matrimonial domicile defined: *Ante*, § 29.

2 *Kraemer*, 52 Cal. 302, 305; *Newcomer v. Orem*, 2 Md. 297, 305; 56 Am. Dec. 717; *Dacey Dom.* p. 263, citing *Stein*, 1 Rose, 462, 481; *Selkirk v. Davis*, 2 Rose, 291; *Story Conf. L.* § 184; *Westlake Inter. L.* § 368; 4 *Phillim. Inter. L.* §§ 476-479; *Savigny Conf. L.* § 379, pp. 240-247; 1 *Foelix Inter. L.* § 50. See *ante*, § 27.

3 *Hinman v. Parkis*, 33 Conn. 183, 197; *Townes v. Durbin*, 3 Met. (Ky.) 352, 357; *Beard v. Basve*, 7 Mon. B. 133, 142; *Gale v. Davis*, 2 Mart. (La.) 301; *King v. O'Brien*, 33 N. Y. Super. 41, 56; *Stokes v. Machen*, 32 Barb. 145, 149; *Gidney v. Moore*, 86 N. C. 484, 491; *Fuss*, 24 Wis. 256, 263, 264; 1 Am. Rep. 180; see 2 Bish. M. W. § 569; 1 Bish. M. & D. § 405; *ante*, § 27; *post*, § 32. This point is not settled in England; *Dacey Dom.* pp. 268-270.

4 Lett, 7 Law R. Jr. 132, 133.

5 *Newcomer v. Orem*, 2 Md. 297, 305; 56 Am. Dec. 717.

6 In spite of change of domicile, see *post*, § 32.

7 *Dacey Dom.* p. 272.

8 *Newcomer v. Orem*, 2 Md. 297, 305; 56 Am. Dec. 717.

9 *Duncan v. Dick*, 1 Miss. 281, 286, 287.

10 *Smith v. McAtee*, 27 Md. 420, 438; *ante*, § 24.

11 *Newcomer v. Orem*, 2 Md. 297, 305; *Corrie*, 2 Bland. 488, 499; *Harrall v. Wallis*, 37 N. J. Eq. 458; *Dacey Dom.* p. 276; *Westlake Inter. L.* § 373; *Savigny Conf. L.* § 379, pp. 347, 348. Consult *post*, § 32; but see *Bonati v. Welsch*, 24 N. Y. 157, 163.

§ 32. **Effect of change of domicile.**—A change of domicile immediately after marriage, in pursuance of an intention formed prior to marriage, may render the new home the real matrimonial domicile.<sup>1</sup> And movable property acquired after the acquisition of a new matrimonial domicile is governed by the law of such new

domicile.<sup>2</sup> But a change of domicile does not affect rights already vested<sup>3</sup> (though a contrary rule seems to prevail in Missouri):<sup>4</sup> it does not transfer a husband's property back to him free of his wife's rights according to the law of the old domicile,<sup>5</sup> nor does it give her new rights in her previously acquired property;<sup>6</sup> so the courts of her new home will protect the wife's property according to the married woman's property act of the old domicile.<sup>7</sup> Still, though moving into another State does not affect title to and rights in existing property, subsequent transfers of such property must conform with the *lex loci*.<sup>8</sup> Also, the survivor's rights as next of kin or legatee<sup>9</sup> (rights which do not vest during coverture)<sup>10</sup> depend on the domicile at the time of the deceased's death.<sup>11</sup>

1 *Ante*, § 29; *State v. Barrow*, 14 Tex. 179, 186, 187.

2 *Ante*, § 32; *Gale v. Davis*, 4 Mart. (La.) 645, 649.

3 *Drake v. Glover*, 30 Ala. 382, 389; *Cahalan v. Monroe*, 70 Ala. 271, 275; *O'Neill v. Henderson*, 15 Ark. 235, 241; 60 Am. Dec. 568; *Parrott v. Nimmo*, 28 Ark. 351, 356; *Hinman v. Parks*, 31 Conn. 188, 197; *Tinkler v. Cox*, 68 Ill. 119; *Dubois v. Jackson*, 49 Ill. 49, 52; *Schurman v. Marley*, 29 Ind. 458, 464; *Beard v. Bayse*, 7 Mon. B. 133, 142, 144, 146; *Townes v. Durbin*, 3 Met. (Ky.) 352, 357; *Kendall v. Coons*, 1 Bush. 530, 531; *Tillexan v. Wilson*, 43 Me. 186, 189, 190; *Bond v. Cummings*, 70 Me. 125, 126; *Woodcock v. Reed*, 5 Allen. 207, 208; *Meyer v. McCabe*, 73 Mo. 236; *State v. Chatham*, 10 Mo. App. 482; *Harrall v. Wallis*, 37 N. J. Eq. 458; 29 Alb. L. J. 170; *Bonati v. Welsch*, 24 N. Y. 157, 163; *King v. O'Brien*, 33 N. Y. Super. 49, 56; *Stokes v. Macken*, 62 Barb. 145, 149; *Craveroff v. Morehead*, 67 N. C. 422, 424; *Oliver v. Robertson*, 41 Tex. 422, 425; *Hall v. Harris*, 11 Tex. 300, 306.

4 Rights to personalty depend on domicile, and change with change of domicile; *Minor v. Cardwell*, 37 Mo. 350, 356. But see *Meyer v. McCabe*, 73 Mo. 236.

5 *King v. O'Brien*, 33 N. Y. Super. 49, 56; *supra*, n. 3.

6 *Bond v. Cummings*, 70 Me. 125, 126; *supra*, n. 3.

7 *Schurman v. Marley*, 29 Ind. 458, 464.

8 *Drake v. Glover*, 30 Ala. 382, 389.

9 See *Stewart M. & D.* §§ 452, 456, 457.

10 See *ante*, § 22.

11 *Townes v. Durbin*, 3 Met. (Ky.) 352, 355; *Newcomer v. Orem*, 2 Md. 297, 305; 56 Am. Dec. 717; *Duncan v. Dick*, 1 Walker (Miss.) 281, 283-285; *Jones v. Gerock*, 6 Jones Eq. 190, 193; *ante*, § 31. But see *Bonati v. Welsch*, 24 N. Y. 157, 163.

§ 33. *Lex rei sitæ*—Immovables.—Rights of husband and wife in immovable property of either are determined by the law of the State where such property is.<sup>1</sup> In compliance with such law such property must be willed<sup>2</sup> or conveyed,<sup>3</sup> and according to such law it descends.<sup>4</sup> And a foreign marriage contract only gives a right of action to be enforced according to the jurisdiction *rei sitæ*.<sup>5</sup> Thus, a statute barring dower by divorce has no extra territorial effect.<sup>6</sup> But when real estate is converted into personalty, the rights in the latter are at once determined by the law of the matrimonial domicile, especially if such personalty is moved into another State.<sup>8</sup> Whether property is movable or immovable depends on the law of the State where it is,<sup>9</sup> though this has been held to depend on the law of the matrimonial domicile.<sup>10</sup> Shares in corporations may thus be immovable property,<sup>11</sup> and other property may be expressly made defendant on the local law.<sup>12</sup> Thus, a bank dividend due a wife is receipted for by the husband; whether the receipt is good depends on the law of the State where the bank is.<sup>13</sup>

1 Glenn, 47 Ala. 204, 207; McDaniel v. Grace, 15 Ark. 465, 478; Mason v. Fuller, 36 Conn. 160, 162; Harvey v. Ball, 32 Ind. 98, 100; Hawkins v. Ragsdale, 80 Ky. 353, 354; Newcomer v. Orem, 2 Md. 297, 305; 56 Am. Dec. 717; Mason v. Homer, 105 Mass. 116, 119; Vertner v. Humphreys, 14 Smedes & M. 130, 143; Frierson v. Williams, 57 Miss. 451, 462; Lapice v. Gereandean, 1 Miss. 480, 483; Duncan v. Dick, 1 Miss. 281, 288; Depas v. Mayo, 11 Nev. 314, 318; Jones v. Gerock, 6 Jones Eq. 190, 194; Castro v. Illies, 22 Tex. 479, 497; Gill v. Cook, 11 Vt. 140, 143; Hill v. Wynn, 4 W. Va. 453, 455; Shaw v. Gould, Law R. 3 H. L. 55, 70; *ante*, § 27.

2 Depas v. Mayo, 11 Mo. 314, 318; 40 Am. Dec. 88; *post*, § 26.

3 McDaniel v. Grace, 15 Ark. 465, 473; Lapice v. Gereandean, 1 Miss. 480, 483; see *post*, § 37.

4 Jones v. Gerock, 6 Jones Eq. 190, 194. See Shaw v. Gould, Law R. 3 H. L. 55, 70; Linggen, 45 Ala. 411, 414, 415; Smith v. Dorr, 34 Pa. St. 126, 128; *ante*, § 27.

5 Castro v. Illies, 22 Tex. 479, 497, 498; *ante*, §§ 27, 28.

6 Hawkins v. Ragsdale, 80 Ky. 353, 354; consult Stewt. M. & D. § 446.

7 Newcomer v. Orem, 2 Md. 297, 305; 56 Am. Dec. 717; *ante*, § 22.

8 Hill v. Wynn, 4 W. Va. 453, 455.

9 Newcomer v. Orem, 2 Md. 297, 305; 56 Am. Dec. 717.

10 *Duncan v. Dick*, 1 Miss. 281, 288.

11 *Graham v. First*, 84 N. Y. 393, 399, 400; 38 Am. Rep. 528. See *Drake v. Glover*, 30 Ala. 382, 389; *Holthaus v. Farris*, 24 Kans. 784; *Hill v. Wright*, 129 Mass. 296; *Howell v. Cassopolis*, 35 Mich. 471; *Harrall v. Wallis*, 37 N. J. Eq. 458; 29 Alb. L. J. 170, 172; *Graham v. Norfolk*, 20 Hun, 326.

12 *Drake v. Glover*, 30 Ala. 382, 389; *Smith v. McAtee*, 27 Md. 420, 438.

13 *Graham v. First*, 84 N. Y. 393, 399; 38 Am. Rep. 528; see *Harrall v. Wallis*, 37 N. J. Eq. 458; 29 Alb. L. J. 170, 172, n.

§ 34. *Lex loci actus*—Validity of acts.—Though personal capacity as a matter of status should be determined by the law of domicile,<sup>1</sup> the validity of an act is often said to depend on the law of the State where it is done.<sup>2</sup> This rule applies particularly to married women's contracts.<sup>3</sup>

1 *Ante*, § 30. See *Dow v. Gould*, 31 Cal. 629, 652; *Frierson v. Williams*, 57 Miss. 451, 462.

2 *Milliken v. Pratt*, 125 Mass. 374, 381, 382; 28 Am. Rep. 241. See *Graham v. First*, 84 N. Y. 393, 402; 38 Am. Rep. 528.

3 *Post*, § 37.

§ 35. *Lex fori*—Procedure.—By whatever law a right is determined, in enforcing such right the form of the remedy and the competency of evidence are governed by the law of the forum.<sup>1</sup> Thus, a married woman domiciled in Maryland has title to her movables by law of Maryland,<sup>2</sup> but sues in respect thereto in New York, according to forms and mode there prescribed.<sup>3</sup> So, even if a married woman's contract is valid, it cannot be enforced in a State where a personal judgment *ex contractu* against a married woman is unknown;<sup>4</sup> it must be enforced, if at all, in equity, though enforceable at law where made.<sup>5</sup>

1 *Halley v. Ball*, 66 Ill. 250, 252; *Bank v. Williams*, 46 Miss. 618, 626-629; 12 Am. Rep. 319; *Stoneman v. Erie*, 52 N. Y. 429, 432; *Le Breton v. Miles*, 8 Paige, 261, 271; *Holmes v. Reynolds*, 55 Vt. 39, 41; *Abbott Trial Ev.* p. 161.

2 *Ante*, § 31.

3 *Stoneman v. Erie*, 52 N. Y. 429, 432.

4 *Bank v. Williams*, 46 Miss. 618, 626, 629; 12 Am. Rep. 319.

5 *Halley v. Ball*, 66 Ill. 250, 252.



§ 36. **Wills of married women.**—A will of immovable property must be executed in accordance with the law of the State where such property is;<sup>1</sup> a will of movable property in accordance with the law of the testatrix's domicile at the time of her death;<sup>2</sup> and the word "executed," in this section, includes forms of the will, capacity to make the will, and power to dispose of the property willed.<sup>3</sup> In some States there are special provisions in regard to the effect of foreign wills.<sup>4</sup>

1 1 Jarm. Wills, 1, citing Story Conf. L. § 474; 4 Kent Com. 513; 2 Kent Com. 429; 1 Keef. Wills, 397; Darby v. Mayer, 10 Wheat. 465; Kerr v. Moon, 9 Wheat. 565; U. S. v. Crosby, 7 Cranch, 115; Varner v. Bevil, 17 Ala. 286; Norris v. Harris, 15 Cal. 226, 252; Richards v. Miller, 62 Ill. 417; Calloway v. Doe, 1 Blackf. 372; Cornelison v. Browning, 10 Mon. B. 425; Potter v. Titcomb, 22 Me. 300, 303; Ross, 129 Mass. 243, 245; Eyre v. Storer, 37 N. H. 114; Knox v. Jones, 47 N. Y. 389; Bailey, 8 Ohio, 239; Williams v. Saunders, 5 Cold. 60; Enoch v. Wylie, 10 H. L. Cas. 1.

2 1 Jarm. Wills 2, citing 4 Kent Com. 513, 524; Harrison v. Nixon, 9 Peters, 483, 504, 505; Smith v. Union, 5 Peters, 518; Turner v. Fenner, 49 Ala. 355; Lawrence v. Kitteridge, 21 Conn. 577; 54 Am. Dec. 385; Perin v. McMicken, 15 Ia. An. 154; Gilman, 52 Me. 165; Fellows v. Miner, 119 Mass. 541; High, 2 Doug. (Mich.) 515; Moultrie v. Hunt, 23 N. Y. 394; Chamberlain, 43 N. Y. 424; Meese v. Keefe, 10 Ohio, 362; Bempe v. Johnstone, 3 Ves. 198.

3 Harrison v. Nixon, 9 Peters, 483, 504, 505; Story Conf. §§ 479 *f*, 479 *g*; 1 Jarm. Wills, 2.

4 See State v. McGlynn, 20 Cal. 233; Bailey, 5 Cush. 245; 1 Jarm. Wills, 2, *n*.

§ 37. **Married woman's contracts.**—A married woman's capacity to contract generally depends on the law of the place where the contract is made;<sup>1</sup> or, according to less usual view, on the law of her domicile.<sup>2</sup> Her capacity to alien immovables depends on the law of the place where they lie,<sup>3</sup> and movables on the law of her domicile.<sup>4</sup> The validity of a contract depends on the law of the place where it is made, its effect on the law of the place where it is to be performed, and its enforcement on the law of the forum.<sup>5</sup> The validity of a married woman's contract, except as to realty,<sup>6</sup> may be sustained by the law of the place where it was made, or of the place fixed on for its performance, or of her domicile at the time it is made, unless prohibited by the law of

the forum.<sup>7</sup> Thus, a wife domiciled in Massachusetts makes a contract in Maine which is void by Massachusetts law, but is valid by Maine law, it is held valid in Massachusetts<sup>8</sup> and in Maine.<sup>9</sup> So a wife domiciled in Mississippi makes a contract in Tennessee which is valid by Mississippi law, but void by Tennessee law, it is held void in Tennessee.<sup>10</sup> So a contract valid in Illinois where it was made, is enforceable in New Jersey where it would have been void;<sup>11</sup> but a contract valid at law where made may be enforceable only in equity in another State.<sup>12</sup> It is hard to define how far the law of the forum may in peculiar circumstances prevail.<sup>13</sup> If the promisor and promisee are in different States, and the promisor mails the promise to the promisee, the contract is made in the State of the promisee and by the law thereof.<sup>14</sup>

1 Scudder v. Union, 91 U. S. 406, 411; Drake v. Glover, 30 Ala. 382, 389; Nixon v. Halley, 78 Ill. 611, 615; Baldwin v. Gray, 16 Mart. (La.) 192, 193; Saul v. Creditors, 17 Mart. (La.) 569, 597; Andrews v. Creditors, 11 La. 464, 476; Bell v. Packard, 69 Me. 105, 110; 31 Am. Rep. 251; Bank v. Williams, 46 Miss. 618, 629; 12 Am. Rep. 319; Milliken v. Pratt, 125 Mass. 374, 377, 381; 28 Am. Rep. 241; Ross, 129 Mass. 243, 246; Wright v. Remington, 41 N. J. L. 48, 51; Pearl v. Hansborough, 9 Humph. 426, 435; Holmes v. Reynolds, 55 Vt. 39, 41; De Grenchy v. Wills, Law R. 4 C. P. D. 362, 364; Dicey Dom. p. 195; *ante*, § 34.

2 Dow v. Gould, 31 Cal. 629, 652; Frierson v. Williams, 57 Miss. 451, 462. See Kelly v. Davis, 28 La. An. 773, 774; Roberts v. Wilkinson, 5 La. An. 369, 373; *ante*, §§ 33, 34.

3 Kelly v. Davis, 28 La. An. 773, 774; Lapice v. Gereaudéau, 4 Miss. 480, 483; Frierson v. Williams, 57 Miss. 451, 462; *ante*, § 33.

4 Kraemer, 52 Cal. 302, 305; Dicey Dom. p. 195; *supra*, n. 2; *ante*, § 31.

5 Scudder v. Union, 91 U. S. 406, 411; *ante*, § 35.

6 *Supra*, n. 3; *ante*, § 31.

7 Abbott Trial Evid. p. 164.

8 Milliken v. Pratt, 125 Mass. 374, 381; 28 Am. Rep. 241.

9 Bell v. Packard, 69 Me. 105, 110; 31 Am. Rep. 251.

10 See Pearl v. Hansborough, 9 Humph. 426, 435.

11 Wright v. Remington, 41 N. J. L. 48, 51.

12 Halley v. Ball, 66 Ill. 250, 252; *ante*, § 35.

13 Whitridge v. Barry, 42 Md. 140, 143, 150; Bank v. Williams, 46 Miss. 618, 629; *ante*, §§ 24, 27, 31, 32.

14 Bell v. Packard, 69 Me. 105, 110; 31 Am. Rep. 251; Milliken v. Pratt, 125 Mass. 374, 376; 28 Am. Rep. 241.

## PART II.

## THE RELATION OF HUSBAND AND WIFE.

- CHAP. III. THE UNITY OF HUSBAND AND WIFE,  
    §§ 38-56.
- IV. CONJUGAL RIGHTS AND OBLIGATIONS,  
    §§ 57-81.
- V. CONJUGAL AGENCY, §§ 82-98.
- VI. POSTNUPTIAL SETTLEMENTS AND DEALINGS, §§ 99-134.

# CHAPTER III.

## THE UNITY OF HUSBAND AND WIFE.

ART. I. THE FICTION OF UNITY, §§ 38, 39.

II. CONTRACTS BETWEEN HUSBAND AND WIFE,  
§§ 40-46.

III. WRONGS BETWEEN HUSBAND AND WIFE,  
§§ 47-49.

IV. WILLS BETWEEN HUSBAND AND WIFE, §§ 50,  
51.

V. SUITS BETWEEN HUSBAND AND WIFE, §§ 52-  
56.

## ARTICLE I.—THE FICTION OF UNITY.

§ 38. Defined and explained.

§ 39. Miscellaneous results of.

§ 38. The fiction of unity defined and explained.—A valid marriage<sup>1</sup> makes the husband and wife *one* legal person.<sup>2</sup> This was one of the best settled fictions of the common law.<sup>3</sup> The woman by marriage became *civiliter mortua*;<sup>4</sup> she was “covered by,”<sup>5</sup> or “merged in,”<sup>6</sup> her husband; she was called a *femme covert*,<sup>7</sup> and her condition coverture.<sup>8</sup> To the civil law this fiction was unknown,<sup>9</sup> and courts of equity began very early to recognize the separate existence of wives, and to follow the civil law.<sup>10</sup> All modern legislation has tended away from the common law and towards the civil law and equity, and has tended towards giving wives their separate property and greater personal capacity;<sup>11</sup> but the courts have nevertheless interpreted the statutes in such a way as to retain as far as possible the fiction of the identity of husband and wife, and the intimacy of the marriage relation.<sup>12</sup> And so this fiction of legal

unity still affects more or less all the reciprocal capacities of husband and wife,<sup>13</sup> and many of their mutual rights and obligations,<sup>14</sup> while from the fact that it is the wife whose identity is lost arise all the disabilities of married women.<sup>15</sup>

1 As to the effect of void or voidable marriage, see fully, Stewart M. & D. §§ 50, 51.

2 1 Blackst. Com. 442; 2 Kent, Com. 129; Litt. § 168; Coke Litt. 112 b; Story Eq. §§ 1367, 1370; 1 Bish. M. & D. §§ 754-760; 1 Bish. M. W. § 25; 1 Bright. H. & W. 2; Schoul. H. & W. § 6; Wells v. Caywood, 3 Colo. 487, 491; Hooker v. Baggs, 63 Ill. 160, 162; Long v. Kinney, 49 Ind. 235, 238; O'Ferrall v. Simplot, 4 Iowa, 381, 389; Winebrinner v. Weisiger, 3 Mon. 32, 34; Trader v. Lowe, 45 Md. 1, 14; Burdeno v. Amperse, 14 Mich. 91, 92; Frissell v. Rozier, 19 Mo. 448, 449; Aultman v. Obermeyer, 6 Neb. 260, 263; Patterson, 45 N. H. 164, 166; White v. Wager, 25 N. Y. 325, 329; Barron, 24 Vt. 375, 398.

3 White v. Wager, 25 N. Y. 325, 329, 330; citations, *supra*, n. 2.

4 O'Ferrall v. Simplot, 4 Iowa, 381, 389.

5 Com. Dig. "Baron et Femme" W.; Litt. § 28.

6 Barron, 24 Vt. 375, 398; Long v. Kinney, 49 Ind. 235, 238.

7 Bonvier Law Dict. "Femme Covert"; *supra*, n. 6.

8 1 Blackst. Com. 442.

9 1 Burge Col. & For. L. 202, 263; Story Eq. § 1367; *ante*, § 7.

10 Morrison v. Thistle, 67 Mo. 596, 600; Story Eq. §§ 1367, *et seq.*; *ante*, § 8; *post*, § 42.

11 See Wells v. Caywood, 3 Colo. 487, 490-492; Albin v. Lord, 39 N. H. 196, 201; *ante*, § 9.

12 Walker v. Reamy, 36 Pa. St. 410, 424; *ante*, §§ 15, 16.

13 *Post*, §§ 39-56.

14 *Post*, §§ 57-134.

15 *Post*, §§ 331, *et seq.*

§ 39. **Miscellaneous results of fiction of unity.**—On the theory that husband and wife are one, which theory has never been and is nowhere logically and broadly applied, but which in every place where the common law is known, influences the status of married persons,<sup>1</sup> husband and wife cannot contract with each other,<sup>2</sup> or wrong each other civilly,<sup>3</sup> or criminally,<sup>4</sup> or sue each other;<sup>5</sup> their interests are the same,<sup>6</sup> so that they could not testify for or against each other;<sup>7</sup> a sale by a trustee to his wife is like a sale to himself.<sup>8</sup> And in many cases the one can act for the other.<sup>9</sup> And because the

wife is merged in the husband she takes his name,<sup>10</sup> and becomes a citizen of the United States if he is one;<sup>11</sup> he is the head of the family,<sup>12</sup> fixes the matrimonial home,<sup>13</sup> and has control of the children,<sup>14</sup> and to some extent of the wife.<sup>15</sup> When real estate is conveyed to husband and wife, they hold it as if one person—they are tenants by entireties.<sup>16</sup>

1 *Ante*, § 38.

2 *White v. Wager*, 25 N. Y. 325, 329, 330; 1 Wash. R. P. 279; *post*, §§ 40–45.

3 *Freethy*, 42 Barb. 641, 645; *post*, § 48.

4 *Thomas*, 51 Ill. 162, 165; *State v. Barry*, 2 Green Cr. Rep. 285, 287, n.; *post* § 49.

5 *Philips v. Barnet*, 1 Q. B. Div. 436; *post*, §§ 52–56.

6 As to husband being witness to will in favor of his wife: See *Hatfield v. Thorp*, 5 Barn. & Ald. 589; *Holdfast v. Dowsing*, 2 Strange, 1253.

7 *Stewart M. & D.* §§ 66, 133, 348, 349, 354; 1 Blackst. Com. 443; *Schoul. H. & W.* § 6; *post*, § 56.

8 *Dundas*, 64 Pa. St. 325, 332, 333. But see *Belcher v. Black*, 68 Ga. 93, 95.

9 *Buford v. Speed*, 11 Bush, 338, 343; *Kerchner v. Kempton*, 47 Md. 568, 589; *post*, §§ 82–98.

10 *Stewart M. & D.* § 463; *Schoul. H. & W.* § 63; *post*, § 61.

11 *Kelly v. Owen*, 7 Wall. 496; *Luhos v. Elmer*, 80 N. Y. 171, 177; *Burton*, 1 Keyes, 359; *Kane v. McCarthy*, 63 N. C. 299; *Leonard v. Grant*, 11 Rep. 327; *Rex v. Manning*, 1 Car. & K. 866.

12 *Stewart M. & D.* §§ 66, 133, 348, 349, 354; *Evans*, 1 Hagg. Const. 35, 115; *post*, § 60.

13 *Stewart M. & D.* §§ 221, 253; *Hanberry*, 29 Ala. 719, 721; *ante*, § 29; *post*, § 60.

14 *Stewart M. & D.* §§ 192, 490–492, 437, 471.

15 *Lister*, 8 Mod. 22, 23; 1 *Strange*, 477; *post*, § 62.

16 *Marbourg v. Cole*, 49 Md. 402, 411; 33 Am. Rep. 266; *post*, §§ 304–306.

## ARTICLE II.—CONTRACTS BETWEEN HUSBAND AND WIFE.

§ 40. Causes affecting validity of.

§ 41. At common law.

§ 42. In equity.

§ 43. Under statutes.

§ 44. Antenuptial.

§ 45. Husband and wife as debtor and creditor.

§ 46. Recent decisions.

§ 40. Causes affecting validity of contracts between husband and wife.—Contract between husband and wife may be attacked on one or more of the following grounds:—

1. Because husband and wife are together one person,<sup>1</sup> while two parties are necessary to every contract.<sup>2</sup>

2. Because a married woman cannot contract with any one.<sup>3</sup>

3. Because of fraud<sup>4</sup> or want of consideration<sup>5</sup> as between the parties.

4. Because of fraud on creditors.<sup>6</sup>

5. Because of a prohibitory public policy<sup>7</sup> or statute.<sup>8</sup> In this article only the *capacity* of husband and wife to contract *together* is discussed; the other grounds of invalidity are treated under “antenuptial settlements,”<sup>9</sup> “postnuptial settlements,”<sup>10</sup> and “deeds of separation.”<sup>11</sup>

1 *Ante*, § 33.

2 *Scarborough v. Watkins*, 9 Mon. B. 540, 545; 50 Am. Dec. 528; *White v. Wager*, 25 N. Y. 325, 329; *post*, §§ 41-45.

3 *Gebb v. Rose*, 40 Md. 387, 393; *Burton v. Marshall*, 4 Gill, 487, 493; *post*, §§ 356-368.

4 *Hon*, 70 Ind. 135, 139; *Helms v. Franciscus*, 2 Bland, 544, 564; 20 Am. Dec. 402; *Pierce*, 71 N. Y. 154; 27 Am. Rep. 769; *post*, § 110.

5 *Patterson*, 45 N. H. 164, 166; *Plummer v. Jarman*, 41 Md. 632, 639; *post*, § 104.

6 *Henkle v. Wilson*, 53 Md. 287, 292; *post*, §§ 113-118.

7 *Stewart M. & D.* § 184.

8 *Stewart M. & D.* § 185.

9 *Stewart M. & D.* §§ 32-43, 382, 459, 461-466.

10 *Post*, ch. 6, §§ 99, *et seq.*

11 *Stewart M. & D.* §§ 181-192.

§ 41. Contracts between husband and wife at common law.—By the common law contracts between husband and wife are absolutely void for want of parties and the wife's power to consent.<sup>1</sup> A mere personal executory contract between them is unqualifiedly void,<sup>2</sup> and a transfer from one to the other can be effected only

through a third party:<sup>3</sup> the would-be grantor conveys to a third party, and the third party conveys to the would-be grantee.<sup>4</sup> This is perfectly legitimate,<sup>5</sup> though the rights of creditors cannot be thus defeated;<sup>6</sup> and liens against the third party do not attach to the property as it passes through his hands.<sup>7</sup> Thus a note from wife to husband is void;<sup>8</sup> as is a note from husband to wife,<sup>9</sup> though he has promised a third party to pay it.<sup>10</sup> So a direct conveyance by husband to wife,<sup>11</sup> or by wife to husband,<sup>12</sup> is void. But a wife may execute a power in favor of her husband,<sup>13</sup> and deal with him in a representative capacity.<sup>14</sup> These contracts may be good in equity though void at law.<sup>15</sup>

1 Beard, 3 Atk. 72; Wallingsford v. Allen, 10 Peters. 583, 593, 594; Stone v. Gazzam, 46 Ala. 269, 273; Frierson, 21 Ala. 549, 555; Pillow v. Wade, 31 Ark. 678; Dibble v. Hullon, 1 Day, 221; Hoker v. Baggs, 63 Ill. 161, 162; Scarborough v. Watkins, 9 Mon. B. 545, 545; 50 Am. Dec. 528; Martin, 1 Me. 394, 398; Johnson v. Stillings, 35 Me. 427, 428; Allen v. Hooper, 50 Me. 371, 374; Preston v. Fryer, 38 Md. 221, 225; Roby v. Phelon, 113 Mass. 541, 542; Jenne v. Marble, 37 Mich. 319, 323; Loomis v. Brush, 36 Mich. 40, 46; Frissell v. Rozier, 19 Mo. 448, 449; Aultman v. Obermeyer, 6 Neb. 260, 264; Patterson, 45 N. H. 164, 166; White v. Wager, 25 N. Y. 328, 332, 333; 32 Barb. 250; Fowler v. Trebein, 16 Ohio St. 433, 497; Johnston, 31 Pa. St. 450, 453; Barron, 24 Vt. 375, 398; Sweat v. Hall, 8 Vt. 187, 189; Putnam v. Bicknell, 18 Wis. 333, 335.

2 Jenne v. Marble, 37 Mich. 319, 323; *supra*, n. 1.

3 Gebb v. Rose, 40 Md. 387, 392; cases *infra*, n. 5.

4 Shepperson, 2 Gratt. 501, 502; cases *infra*, n. 5.

5 Huftalin v. Misner, 70 Ill. 55, 60; Gebb v. Rose, 40 Md. 387, 392; Motte v. Alger, 15 Gray, 322, 323; Jewell v. Porter, 31 N. H. 34, 38; Merriam v. Harsen, 4 Edw. Ch. 70, 82; White v. Wager, 25 N. Y. 328, 332, 333; Dukes v. Spangler, 35 Ohio St. 119, 125; Garvin v. Ingram, 10 Rich. Eq. 130, 136; Shepperson, 2 Gratt. 501, 502.

6 Chicago v. Magraw, 75 Ill. 566, 568; *post*, §§ 113-118.

7 O'Donnell v. Kerr, 50 How. Pr. 334, 335.

8 Roby v. Phelon, 113 Mass. 541, 542.

9 Hoker v. Baggs, 63 Ill. 161, 162; Patterson, 45 N. H. 164, 166.

10 Sweat v. Hall, 8 Vt. 187, 189.

11 Beard, 3 Atk. 72; Martin, 1 Me. 394, 398.

12 Scarborough v. Watkins, 9 Mon. B. 540, 545; 50 Am. Dec. 528; Gebb v. Rose, 40 Md. 387, 392.

13 Schley v. McCeney, 36 Md. 266, 273; Bradish v. Gibbs, 3 Johns. Ch. 523, 536; Hoover v. Society, 4 Whart. 445, 453; *post*, § 205.

14 See Richards, 2 Barn. & Adol. 447; *post*,

15 Sims v. Ricketts, 55 Ind. 181, 192, 193; 9 Am. Rep. 311; *post*, § 42.



§ 42. **Contracts between husband and wife in equity.**— Courts of equity have always recognized both the duality of husband and wife,<sup>1</sup> and the capacity of married women to hold,<sup>2</sup> convey,<sup>3</sup> and charge by contract,<sup>4</sup> property which is called their sole and separate estate.<sup>5</sup> Therefore these courts give effect to a husband's promises<sup>6</sup> and transfers<sup>7</sup> to his wife, and also enforce a wife's agreements with her husband respecting her property,<sup>8</sup> though they do not recognize any personal obligation she may attempt to assume.<sup>9</sup> But to be enforceable in equity a contract must be equitable:<sup>10</sup> it must be fairly made,<sup>11</sup> and there must be a proper consideration.<sup>12</sup> The intervention of a trustee is not necessary,<sup>13</sup> but any contract directly between husband and wife is valid in equity, if the intervention of a third party would have made it valid at law.<sup>14</sup> In this way the relation not only of grantor and grantee,<sup>15</sup> but also of debtor and creditor,<sup>16</sup> may exist between husband and wife.<sup>17</sup> Thus, courts of equity give effect to deeds of separation;<sup>18</sup> to gifts from husband to wife,<sup>19</sup> and from wife to husband;<sup>20</sup> to a deed from husband to wife, at least as a declaration of trust;<sup>21</sup> to a deed of her sole and separate estate from a wife to her husband;<sup>22</sup> to a husband's agreement on valuable consideration to convey property to his wife;<sup>23</sup> to a wife's agreement fairly made on valuable consideration to make her husband an allowance out of her separate estate;<sup>24</sup> so, a husband's note to his wife in payment for her separate property will be enforced;<sup>25</sup> or his promise to repay her money which with such understanding she has allowed him to use;<sup>26</sup> when he uses her separate estate without her knowledge or against her wishes, a promise to repay will be implied;<sup>27</sup> when he uses it with her consent and acquiescence, a gift of it by her to him will be presumed;<sup>28</sup> when he invests

it in property he will be decreed to hold such property as her trustee;<sup>29</sup> so he may agree to buy property for her with his funds, she to reimburse him, and the property so bought is hers;<sup>30</sup> so a wife's note to her husband which would have been valid at law if drawn in favor of a third party, is valid in equity;<sup>31</sup> as are her stipulations in agreements which her husband has executed or by which he is bound.<sup>32</sup>

1 *Ante*, §§ 8, 35.

2 Story Eq. Juris. § 1377; 1 Fonbl. Eq. B. 1 Ch. 2, § 6, n. n; *post*, § 202.

3 Chew v. Beall, 13 Md. 348, 350; *post*, § 205.

4 Price v. Bingham, 7 Har. & J. 206, 318; *post*, §§ 206, 207.

5 Discussed fully *post*, §§ 197-216, WIFE'S EQUITABLE SEPARATE PROPERTY.

6 McCampbell, 2 Lea, 661, 664; *infra*, n. 16.

7 Murray v. Glasse, 23 Law J. Ch. 126, 127; Moore v. Page, 111 U. S. 117; Sims v. Ricketts, 35 Ind. 181, 192, 193; 9 Am. Rep. 679; *infra*, notes 15, 17, 21.

8 Worinley, 98 Ill. 544, 553; *infra*, notes 17, 22, 24, 32.

9 Because married women can contract in equity only respecting their property: See *Jenne v. Marble*, 37 Mich. 319, 323; *post*, § 237. But see *Morrison v. Thistle*, 67 Mo. 586, 600, 601.

10 Loomis v. Brush, 36 Mich. 40, 45. Consult *post*, §§ 122, 121.

11 Hon, 70 Ind. 135, 139; Helms v. Franciscus, 2 Blau 1, 544, 561; 20 Am. Dec. 402; *post*, § 110.

12 Wallingsford v. Allen, 10 Peters, 583, 593; Stone v. Gazzari, 36 Ala. 269, 273; Sims v. Ricketts, 35 Ind. 181, 193; 9 Am. Rep. 679; Stockett v. Halliday, 9 Md. 489, 498; White v. Wagner, 25 N. Y. 428, 434; Winans v. Pebles, 32 N. Y. 423, 426; Fowler v. Treblein, 13 Ohio St. 493, 497; *post*, § 104.

13 Jones v. Clifton, 191 U. S. 225, 229; Sims v. Ricketts, 35 Ind. 181, 193; 9 Am. Rep. 679.

14 Sims v. Ricketts, 35 Ind. 181, 193; 9 Am. Rep. 679; Pennison, 36 Mo. 77, 81; Barron, 24 Vt. 375, 388, 399.

15 Murray v. Glasse, 23 Law J. Ch. 123, 127; Sperling v. Rochfort, 3 Vt. 161, 175; *infra*, notes 17, 22.

16 Stone v. Glazzam, 46 Ala. 269, 273; Sims v. Ricketts, 35 Ind. 181, 190-194; 9 Am. Rep. 679; Edelen, 11 Md. 415, 420; Mayfield v. Kilgour, 31 Md. 240, 244; Myers v. King, 42 Md. 65, 70; Drury v. Briscoe, 42 Md. 154, 162; Olenhoff v. Devlin, 48 Md. 439, 446; Morrison v. Thistle, 67 Mo. 586, 601; Aultman v. Obermeyer, 6 Neb. 269, 271; Barron, 24 Vt. 375, 388; Putnam v. Bicknell, 18 Wis. 333, 335.

17 Many cases are collected in Ewell's Lead. Cas. on coverture, but the authorities on this point are too numerous for enumeration: Sims v. Ricketts, 35 Ind. 181, 190-194, is the fullest case.

18 See fully Stewart M. & D. §§ 181-192.

19 Kohner v. Ashenauer, 17 Cal. 578, 582; Underhill v. Morgan, 23 Conn. 165, 167; Warlick v. White, 86 N. C. 159; 41 Am. Rep. 453.

20 Edelen, 11 Md. 415, 420; Kuhn v. Stansfield, 28 Md. 210, 215; Hill, 28 Md. 183, 185; Lyle, 11 Phila. 64; *infra*, n. 25.

21 Murray v. Glasse, 23 Law J. Ch. 126, 127; Dale v. Lincoln, 62 Ill. 22, 26; Sims v. Ricketts, 35 Ind. 181, 192; 9 Am. Rep. 679; Jones, 15 Md. 461, 468; Shepard, 7 Johns. Ch. 57, 61; 11 Am. Dec. 336; Bradish v. Gibbs, 3 Johns. Ch. 523, 540. See Sexton v. Wheaton, 8 Wheat. 223; 1 Am. Lead. Cas. 1; *post*, POSTNUPTIAL SETTLEMENTS, §§ 99-134.

22 Scarborough v. Watkins, 9 Mon. B. 540, 545; 50 Am. Dec. 528; *post*, §§ 205, 236.

23 Stockett v. Halliday, 9 Md. 480, 498; Boone v. Stonestreet, 6 Md. 418, 430; Livingston, 2 Johns. Ch. 537; Winans v. Peebles, 52 N. Y. 423, 426; Putnam v. Bicknell, 18 Wis. 333, 335.

24 Moore v. Freeman, Bunn. 205; Story Eq. Juris. § 1372.

25 McCampbell, 2 Lea, 661, 664.

26 Hon, 70 Ind. 135, 139; Drury v. Briscoe, 42 Md. 151, 162; Hill, 28 Md. 183, 185; Edelen, 11 Md. 415, 420; Moyer, 77 Pa. St. 482.

27 Gover v. Owings, 16 Md. 91, 99; Edelen, 11 Md. 415, 420. *See quere.*

28 Courtwright, 53 Iowa, 57, 60; Hamilton v. Lightner, 53 Iowa, 470, 472; Sabel v. Slinghiff, 52 Md. 152, 154; Jacobs v. Hesler, 113 Mass. 157; Clark v. Rosekrans, 31 N. J. Eq. 655; Reeder v. Flinn, 6 Rich. 216; Lishey, 2 Tenn. Ch. 5.

29 Harris v. Brown, 30 Ala. 401, 402; Rich v. Tubbs, 41 Cal. 34, 35; Ingersoll v. Truebody, 40 Cal. 603, 611; Thomas v. Standiford, 49 Md. 181, 184; Keller, 45 Md. 270, 274; Tresh v. Wirtz, 31 N. J. Eq. 124, 129. Consult *post*, §§ 88, 132.

30 Myers v. King, 42 Md. 65, 70. See McCowan v. Donaldson, 123 Mass. 169; *post*, §§ 84, 88.

31 Morrison v. Thistle, 67 Mo. 596, 601.

32 See Townshend v. Windham, 2 Ves. 7; More v. Freeman, Bunn. 205; Wormley, 98 Ill. 544, 553; Robertson, 25 Iowa, 350, 351, 354; McCubbin v. Patterson, 16 Md. 173, 175; Livingston, 2 Johns. Ch. 537, 539; Garver v. Miller, 16 Ohio St. 527, 531; Hutton v. Ducey, 3 Pa. St. 100, 104.

§ 43. Contracts between husband and wife under statutes. —The word "contract" in this section includes (1) executory contracts or contracts proper; (2) executed contracts or transfers; (3) and transfers without consideration, or gifts. Under the unwritten common law contracts between husband and wife are absolutely void at law, because a wife has no capacity to contract at all, and because husband and wife being one, any contract between them is void for want of parties.<sup>1</sup> But in equity where the duality of husband and wife has always been recognized and where a wife has always

had a limited capacity to contract as to her separate property, contracts between husband and wife if *equitable* are valid.<sup>2</sup> The statute, the effect of which is in question, may refer (1) expressly to contracts between husband and wife, or (2) simply to contracts of married women.

1. Some statutes expressly prohibit contracts<sup>3</sup> or some contracts<sup>4</sup> between husband and wife; others expressly authorize them.<sup>5</sup> A statute prohibiting contracts between husband and wife destroys their prior capacity only so far as such capacity is expressly referred to or as is necessary to secure the efficiency of the statute.<sup>6</sup> A statute authorizing contracts between husband and wife generally includes all contracts each could make with a third party, but if it specifies certain contracts the capacity it gives is confined to these.<sup>7</sup> If annexed to a general statute empowering a married woman to contract there is a clause excepting certain specified contracts with her husband, such statute gives her power to make all contracts with her husband, but those excepted, which it enables her to make with third parties.<sup>8</sup> Thus, under the Alabama statute, which provides that a married woman may contract but may not make a contract of sale with her husband, she may make any other contract with him and receive gifts from him;<sup>9</sup> and under the Maryland statute, which provides that a married woman may acquire property except from her husband in prejudice of his creditors' rights, she may acquire property directly from her husband when his creditors are not affected;<sup>10</sup> but a statute like that of Iowa<sup>11</sup> authorizing transfers between husband and wife does not authorize personal contracts.<sup>12</sup> There are statutes on this subject like that of Kansas,<sup>13</sup> the effect of which must be purely speculative.

2. Married women acts not referring to contracts

between husband and wife, but giving a married woman the capacity to contract with the assent or joinder of her husband,<sup>14</sup> do not enable her to contract with her husband,<sup>15</sup> except perhaps when assent alone is required to transfer property to him in equity.<sup>16</sup> Thus, where a married woman can convey only by joint deed with her husband such a joint deed to her husband is void;<sup>17</sup> and where she can jointly with her husband make written contracts<sup>18</sup> a promissory note by husband and wife to husband is void,<sup>19</sup> but where a married woman may assign her property with the assent of her husband, such an assignment may be valid in equity.<sup>20</sup> Whether a general statute enabling a married woman to contract *as if unmarried*,<sup>21</sup> enables her to contract with her husband is disputed.<sup>22</sup> On the one hand it is said that the incapacity of husband and wife to contract together is an incapacity of the husband as well as of the wife and is not now removed when the incapacity of the wife alone is destroyed;<sup>23</sup> that contracts between husband and wife are void not only because one of the parties is under disability, but because both parties are one,<sup>24</sup> and therefore are not made valid by a statute which simply removed that disability;<sup>25</sup> that the rule is well settled that married women acts do not affect the unity of husband and wife,<sup>26</sup> and by this rule a married woman's enabling act changes the status of a wife only toward third persons unless it refers expressly to her husband.<sup>27</sup> On the other hand it is assumed that legislatures intended to include contracts with husbands.<sup>28</sup> The former is the correct, but the latter is the best established view. It is consistent with both views that courts of equity, which have never recognized the disability from the unity of husband and wife,<sup>29</sup> should put contracts between husband and wife relating to her statutory sepa-

rate estate on the same footing as contracts relating to her equitable separate estate,<sup>30</sup> especially as statutes creating separate estates are often simply declaratory of the unwritten law administered by courts of equity.<sup>31</sup>

1 *Searborough v. Watkins*, 9 Mon. B. 540, 545; 50 Am. Dec. 528; *Johnson v. Stillings*, 36 Me. 427, 428; *White v. Wager*, 25 N. Y. 328, 332, 333; 32 Barb. 250; *ante*, § 41.

2 *Wallingsford v. Allen*, 10 Peters, 583, 593, 594; *Dale v. Lincoln*, 62 Ill. 22, 26; *Stockett v. Halliday*, 9 Md. 480, 498; *Loomis v. Brush*, 36 Mich. 40, 46; *Winans v. Peebles*, 32 N. Y. 423, 426; *ante*, § 42.

3 Ala. Code, 1876, § 2709; Mass. P. S. 1882, p. 819, § 2; *Bassett* 112 Mass. 93, 100.

4 La. Civ. Code, 1875, §§ 2326, 2327; Minn. St. 1878, p. 769, § 4.

5 Cal. Civ. Code, 1881, §§ 158, 159; Pa. Pur. Dig. 1872, p. 1007, § 21.

6 See *Ingoldby v. Juan*, 12 Cal. 564, 575, 576; *MacKay v. Love*, 25 Cal. 367, 381, 382; *ante*, § 16.

7 *Jenne v. Marble*, 37 Mich. 319, 323. See *Sturmfeitz v. Frickey*, 43 Md. 569, 571; *Robertson v. Bruner*, 21 Miss. 242, 244; *ante*, § 16.

8 *Goree v. Walthall*, 44 Ala. 161, 164, 165; *Trader v. Lowe*, 45 Md. 1, 14; *Gregory v. Dodds*, 60 Miss. 549, 552; *Whitney v. Wheeler*, 116 Mass. 70; *ante*, §§ 14, 16.

9 *Goree v. Walthall*, 44 Ala. 161, 164, 165; *Goodlett v. Hansel*, 66 Ala. 151; *Harden v. Darwin*, 66 Ala. 55.

10 *Trader v. Lowe*, 45 Md. 1, 11.

11 Iowa R. C. 1880, § 2206; but § 1035 may authorize them: *Robertson*, Iowa, 350, 355.

12 *Jenne v. Marble*, 37 Mich. 319, 321; *ante*, § 15.

13 Kan. C. L. 1881, p. 531, § 3136.

14 Such as Md. R. C. 1878, pp. 482, 483, §§ 20, 30.

15 *Breit v. Yeaton*, 101 Ill. 242, 262; *Hogan*, 89 Ill. 427, 433, 434; *Brooks v. Keane*, 86 Ill. 547, 549; *Line v. Blizzard*, 70 Ind. 25; *Kinneman v. Pyle*, 44 Ind. 255; *Searborough v. Watkins*, 9 Mon. B. 540, 545; 50 Am. Dec. 528; *Gebb v. Rose*, 40 Md. 387, 392; *ante*, § 14.

16 See *Whitridge v. Barry*, 42 Md. 140, 151, 152.

17 *Gebb v. Rose*, 40 Md. 387, 392.

18 Such as Md. R. C. 1878, p. 482, § 20.

19 Inference from cases, *supra*, n. 14.

20 *Whitridge v. Barry*, 42 Md. 140, 151, 152.

21 Such as Ill. R. S. 1880, p. 532, § 6; Mich. R. S. 1882, § 6295.

22 That she can, see *Bank v. Banks*, 101 U. S. 240, 244, 245; *Kirkend*, 3 Biss. 405, 410; *Wells v. Gaywood*, 3 Colo. 487, 494; *Hamilton*, 89 Ill. 349, 351; *Robertson*, 25 Iowa, 350, 355; *Allen v. Hooper*, 50 M. 371, 374, 375; *Jenne v. Marble*, 37 Mich. 319, 321, 323; *Ransom*, 30 Mich. 328, 330; *Rankin v. West*, 25 Mich. 195, 200; *Burdens v. Amperse*, 11 Mich. 91, 97; *Albin v. Lord*, 30 N. H. 196, 203, 204; *Zimmerman v. Erhard*, 58 How. Pr. 11, 13; *Woodward v. Sweet*, 51 N. Y. 81. That she cannot, see *Hoker v. Boggs*, 63 Ill. 161, 163; *Whitney v. Classon*, 8. J. C. Mass.

Nov. 8, 1801; Knowles v. Hull, 90 Mass. 562, 564, 565; Lord v. Parker, 3 Allen, 127, 129; Aultman v. Obermeyer, 6 Neb. 260, 264; Savage v. O'Neill, 42 Barb. 374, 379; White v. Wager, 25 N. Y. 328, 330-334; *ante*, § 14.

22 White v. Wager, 25 N. Y. 328, 333; denied, Burdeno v. Amperse, 14 Mich. 87, 91.

24 *Supra*, n. 1; *ante*, §§ 38, 41.

25 White v. Wager, 25 N. Y. 328, 333.

26 See full discussion of this rule: *Ante*, § 14.

27 See cases cited, *supra*, n. 22.

28 Wells v. Gaywood, 3 Colo. 487, 494; cases *supra*, n. 22.

29 *Supra*, n. 2; *ante*, § 42.

30 See Whitridge v. Barry, 42 Md. 140, 152; Hall v. Eccleston, 37 Md. 510, 520; *infra*, n. 31.

31 Jenne v. Marble, 37 Mich. 319, 323; Albin v. Lord, 39 N. H. 196, 203, 204; *ante*, § 16.

§ 44. Antenuptial contracts between husband and wife.—Transfers of property are not affected by the subsequent marriage of the grantor and grantee.<sup>1</sup> But if in the case of executory contracts, the promisor or obligor marries the promisee or obligee, the contracting parties become one,<sup>2</sup> and the obligation of the contract is destroyed.<sup>3</sup> Such is the rule at common law<sup>4</sup> necessarily, as the husband is bound to settle his wife's antenuptial obligations,<sup>5</sup> is entitled to collect her debts,<sup>6</sup> and cannot sue or be sued by her.<sup>7</sup> And the same rule applies when one of several obligors marries one of several obligees.<sup>8</sup> But, even at law, if one of the parties contracted in a representative capacity,<sup>9</sup> or if the contract was made to take effect after marriage,<sup>10</sup> it was not extinguished; and courts of equity have always sustained contracts fairly made in consideration of marriage,<sup>11</sup> contracts which fall within the definition of marriage settlements.<sup>12</sup> If a husband agrees by marriage settlement,<sup>13</sup> or otherwise,<sup>14</sup> that his wife shall have her property to her separate use,<sup>15</sup> or if a statute secures to her her "property"<sup>16</sup> owned at the time of her marriage,<sup>17</sup> an obligation of her husband held by her is not extinguished, for choses in action *ex contractu* are "*property*."<sup>18</sup> But

such an agreement or statute has no effect on a wife's obligation to her husband.<sup>19</sup> An assignment of the obligation before marriage prevents its extinguishment,<sup>20</sup> but assignment after marriage has no saving effect.<sup>21</sup> The enforcing of contracts which are not extinguished depends on the law of procedure;<sup>22</sup> sometimes all remedy is suspended during coverture;<sup>23</sup> sometimes by statute there is full remedy at law;<sup>24</sup> but usually such contracts are enforced only by courts of equity,<sup>25</sup> which are not hampered by the fiction of unity of husband and wife.<sup>26</sup> After the death<sup>27</sup> of the promisor,<sup>28</sup> or promisee,<sup>29</sup> the remedy is at law, as it is after a decree of absolute divorce between them.<sup>30</sup> Thus, an antenuptial contract between husband and wife renouncing or settling marriage property rights is not extinguished by marriage,<sup>31</sup> nor is a promissory note from husband to wife in consideration of marriage.<sup>32</sup> One of several covenantor's marries one of several covenantees, the covenant is released.<sup>33</sup> A woman marries one of a firm which is indebted to her; by an antenuptial settlement her property is secured to her, her right against the firm is not extinguished.<sup>34</sup> A married woman buys a note against her husband, he never asks her for it or asserts his marriage right to it, it is not extinguished.<sup>35</sup> A woman just before her marriage actually assigns a note against her future husband to a third party,<sup>36</sup> but does not indorse it till after her marriage, the note is not extinguished.<sup>37</sup> A husband takes an assignment of a claim against his wife from a third party, he then assigns it back, it is extinguished.<sup>38</sup> A woman mortgagor marries the mortgagee, the mortgage is released in spite of a married woman's property act.<sup>39</sup> A statute secures a married woman her separate property; she has an antenuptial note from her husband; she may sue him on it,<sup>40</sup> according to different practice, at law,<sup>41</sup>



or in equity,<sup>42</sup> but a debt due her by him for antenuptial services is released in spite of such a statute.<sup>43</sup>

1 This seems self evident; covenants in the instrument might, however, be affected.

2 *Ante*, § 38.

3 Flenner, 29 Ind. 564, 566; Power v. Lester, 23 N. Y. 527, 529.

4 See Baker v. Hall, 12 Ves. 497; Marriot v. Thompson, 2 P. Wms. 98; Fitzgerald, Law R. 2 P. C. 83; Price, Law R. 11 Ch. Div. 163, 166; King v. Green, 2 Stewt. 133, 135; 19 Am. Dec. 46; Long v. Kinney, 49 Ind. 235, 238; Flenner, 29 Ind. 564, 566; Suttles v. Whitlock, 4 Mon. 451, 452; Mitchell, 4 Mon. B. 380, 381; Carleton, 72 Me. 115, 116; Guptill v. Horne, 63 Me. 405, 408; Barton, 32 Md. 214, 224; Chapman v. Kellogg, 102 Mass. 246, 248; Abbott v. Winchester, 105 Mass. 111; Vogel, 22 Mo. 161; Burleigh v. Coffin, 22 N. H. 118, 127, 128; 53 Am. Dec. 236; Russ v. George, 35 N. H. 467, 468; Power v. Lester, 17 How. Pr. 413, 415; 23 N. Y. 527, 529; Smiley, 18 Ohio St. 543, 544; Boatright v. Wingate, Trend. 521, 522; McCampbell, 2 Lea, 661, 664; Bennett v. Winfield, 4 Heisk. 440, 444; Barron, 24 Vt. 375, 398; Ewell's Lead. Cas. "Coverture," 245.

5 Long v. Kinney, 49 Ind. 235, 238; *post*, § 67.

6 Flenner, 29 Ind. 564, 568; *post*, §§ 171-176.

7 Barton, 32 Md. 214, 224; *post*, §§ 52-56.

8 Suttles v. Whitlock, 4 Mon. 451, 452.

9 Richards, 2 Barn. & Adol. 447, 451; King v. Green, 2 Stewt. 133, 135; 19 Am. Dec. 46. See Cotton v. King, 2 Vern. 290; Acton v. Pierce, 2 Vern. 480. Consult *ante*, § 41; *post*, § 363.

10 Long v. Kinney, 49 Ind. 235, 238. See Cage v. Acton, 1 Raym. 515; Milbourne v. Ewart, 5 Term Rep. 381; Foord, 5 Term Rep. 386; Cannel v. Buckle, 2 P. Wms. 242; Ewbank v. Hallowell, 2 Bro. C. C. 220; Furger v. Renton, 1 Vern. 408; *post*, § 266.

11 Cannel v. Buckle, 2 P. Wms. 242; Moore v. Ells, Bunb. 205; Cotton, 2 Vern. 290; Neves v. Scott, 9 How. Pr. 6, 208; West v. Howard, 20 Conn. 581, 587; Camp v. Smith, 61 Ga. 449, 451; Bennett v. Winfield, 4 Heisk. 440, 447; Stewart M. & D. § 40.

12 Discussed fully, Stewart M. & D. §§ 32-43.

13 McCampbell, 2 Lea, 661, 664; Bennett v. Winfield, 4 Heisk. 440, 444, 447; *post*, § 263.

4 Russ v. George, 45 N. H. 467, 468, 469.

5 See *post*, EQUITABLE SEPARATE ESTATE, §§ 197-216.

6 See *post*, STATUTORY SEPARATE ESTATE, §§ 217-243.

7 Wilson, 36 Cal. 447, 450, 453; Flenner, 29 Ind. 564, 566; Carleton, 72 Me. 115, 116; Barton, 32 Md. 214, 224; Power v. Lester, 17 How. Pr. 413, 23 N. Y. 527, 529. *Contra*, Smiley, 18 Ohio St. 405, 408.

8 Barton, 32 Md. 214, 225; *post*, § 229.

9 Long v. Kinney, 49 Ind. 235, 238.

10 Guptill v. Horne, 63 Me. 405, 408.

11 Chapman v. Kellogg, 102 Mass. 246, 248.

12 *Post*, SUITS BETWEEN HUSBAND AND WIFE, §§ 52-56.

13 King v. Green, 2 Stewt. 133, 135. See Tucker v. Fenns, 110 Mass. 1; Cormerais v. Wesselhoeft, 114 Mass. 550.

14 Wilson, 36 Cal. 447, 450, 451; Flenner, 29 Ind. 564, 568.

- 26 Barton, 32 Md. 214, 224; *post*, § 53.
- 26 *Ante*, §§ 38, 42.
- 27 As to effect of death, see Stewart M. & D. §§ 452-475.
- 28 Barton, 32 Md. 214, 224.
- 29 Mitchell, 40 Mon. B. 38, 381.
- 30 See Webster, 58 Me. 139, 144; 4 Am. Rep. 253; Stewart M. & D. § 412.
- 31 Crane v. Gough, 4 Md. 317, 331; Stewart M. & D. §§ 42, 461.
- 32 Wright, 50 Barb. 505, 506; a statute.
- 33 Suttles v. Whitlock, 4 Mon. 451, 452.
- 34 Bennett v. Winfield, 4 H. & S. 140, 144, 447.
- 35 Russ v. George, 15 N. H. 467, 468, 469.
- 36 As to ASSIGNMENTS IN FRAUD OF FUTURE SPOUSE, see Stewart M. & D. § 41.
- 37 Guptill v. Horne, 63 Me. 405, 408.
- 38 Chapman v. Kellogg, 102 Mass. 216, 248.
- 39 Long v. Kinney, 49 Ind. 235, 238.
- 40 Cases cited *supra*, n. 17.
- 41 Wilson, 36 Cal. 447, 450, 453.
- 42 Barton, 32 Md. 214, 224.
- 43 Smiley, 18 Ohio St. 513, 541. *Contra*, Carleton, 72 Me. 115, 116.

§ 45. The relation of debtor and creditor between husband and wife. — According to the terms of sections 41-44 the relation of debtor and creditor may exist between husband and wife.<sup>1</sup> No stronger proof is required to establish this relation in this case than in other cases;<sup>2</sup> and the wife or husband has no legal advantage over, or disadvantage with respect to other creditors.<sup>3</sup> Thus, if a husband may prefer a stranger creditor he may prefer his wife if she is a creditor,<sup>4</sup> but his wife has as wife no lien on his estate for his debts to her.<sup>5</sup> Though a husband has bought with her money land in his name, his assignee without notice takes it free of the trust,<sup>6</sup> and she must proceed against her husband as any other creditor would for breach of contract or trust.<sup>7</sup> Still this relation between them is not altogether normal, for it is sometimes recognized only in equity.<sup>8</sup>

1 See also collected cases as to law of different States in § 46.

2 Meyers v. King, 42 Md. 65, 70.

3 *Rowland v. Plummer*, 50 Ala. 182, 193; *Mayfield v. Kilgour*, 13 Md. 240, 241.

4 *Rowland v. Plummer*, 50 Ala. 182, 193; *Tomlinson v. Matthews*, 98 Ill. 182; *French v. Motley*, 63 Me. 326, 327; *Mayfield v. Kilgour*, 31 Md. 240, 241; *Crane v. Barkdoll*, 59 Md. 534, 525; *Jaycox v. Caldwell*, 51 N. Y. 395, 398; *Rose v. Latschaw*, 90 Pa. St. 238, 241; *Lahr*, 90 Pa. St. 507, 511.

5 *Betts*, 18 Ala. 787.

6 *Gorman v. Wood*, 68 Ga. 524, 527.

7 *Betts*, 18 Ala. 787.

8 *Ante*, § 12; *post*, §§ 127, 132.

§ 46. Recent decisions as to contracts between husband and wife. — The result of the combination of the statutes of the various States with the unwritten law may be seen in recent and leading cases in the Supreme Court of the United States,<sup>1</sup> and in Alabama,<sup>2</sup> Arkansas,<sup>3</sup> California,<sup>4</sup> Colorado,<sup>5</sup> Connecticut,<sup>6</sup> Delaware,<sup>7</sup> Florida,<sup>8</sup> Georgia,<sup>9</sup> Illinois,<sup>10</sup> Indiana,<sup>11</sup> Iowa,<sup>12</sup> Kansas,<sup>13</sup> Kentucky,<sup>14</sup> Louisiana,<sup>15</sup> Maine,<sup>16</sup> Maryland,<sup>17</sup> Massachusetts,<sup>18</sup> Michigan,<sup>19</sup> Minnesota,<sup>20</sup> Mississippi,<sup>21</sup> Missouri,<sup>22</sup> Nebraska,<sup>23</sup> Nevada,<sup>24</sup> New Hampshire,<sup>25</sup> New Jersey,<sup>26</sup> New York,<sup>27</sup> North Carolina,<sup>28</sup> Ohio,<sup>29</sup> Oregon,<sup>30</sup> Pennsylvania,<sup>31</sup> Rhode Island,<sup>32</sup> South Carolina,<sup>33</sup> Tennessee,<sup>34</sup> Texas,<sup>35</sup> Vermont,<sup>36</sup> Virginia,<sup>37</sup> West Virginia,<sup>38</sup> Wisconsin.<sup>39</sup> P. stnuptial settlements are fully discussed in another chapter.<sup>40</sup>

1 *Bank v. Banks*, 101 U. S. 240, 244; *Jones v. Clifton*, 101 U. S. 225, 229; *Kesner v. Trigg*, 98 U. S. 50; *Wallingsford v. Allen*, 10 Peters, 583, 593; *Sexton v. Wheaton*, 8 Wheat. 229; 1 Am. L. C. 1.

2 *Goodlett v. Hansel*, 66 Ala. 151; *Harden v. Darwin*, 66 Ala. 55; *Hayne v. Miller*, 61 Ala. 62; *Helmetag v. Fronk*, 61 Ala. 67; *McMillan v. Peacock*, 57 Ala. 127; *Barker*, 32 Ala. 473; *Stone v. Gazzam*, 46 Ala. 269; *Reel v. Overall*, 39 Ala. 138; *Goree v. Walthall*, 44 Ala. 161; *Goodrich*, 44 Ala. 670; *Johnson v. West*, 43 Ala. 689; *Bibb v. Pope*, 43 Ala. 190; *Northington v. Faber*, 52 Ala. 45; *Barclay v. Plant*, 50 Ala. 509; *Rowland v. Plummer*, 50 Ala. 182; *Halloway v. Grace*, 50 Ala. 43; *Frierson*, 21 Ala. 549, 555.

3 *Ward*, 26 Ark. 586; *Chambers v. Sallie*, 29 Ark. 407; *Eddnis v. Buck*, 23 Ark. 507; *Smith v. Yell*, 8 Ark. 470; *Dodd v. McCraw*, 8 Ark. 106; 46 Am. Dec. 301.

4 *Higgins*, 46 Cal. 259; *Swain v. Duane*, 48 Cal. 358; *Rich v. Tubbs*, 41 Cal. 34; *Wilson*, 33 Cal. 447, 450; *Peck v. Brummagin*, 31 Cal. 410; *Dow v. Gould*, 31 Cal. 629; *Fuller v. Ferguson*, 26 Cal. 546; *Burpee v. Bunn*, 22 Cal. 194; *Kohner v. Ashenauer*, 17 Cal. 578; *Barker v. Koneman*, 13 Cal. 9; *George v. Ransom*, 14 Cal. 658.

- 5 Wells v. Caywood, 3 Colo. 487, 494.
- 6 Grain v. Shipman, 45 Conn. 572; Boardman, 40 Conn. 169; Jennings v. Davis, 31 Conn. 134; Underhill v. Morgan, 33 Conn. 105, 107; Watrous v. Walker, 7 Conn. 224.
- 7 Kilby v. Goodwin, 2 Del. Ch. 61.
- 8 Alston v. Rowles, 13 Fla. 117.
- 9 Francis v. Dickel, 63 Ga. 255, 257, 258; Thompson v. Feagin, 60 Ga. 82; Booker v. Worrell, 55 Ga. 332; 57 Ga. 235; Shorter v. Methair, 52 Ga. 25; Churchill v. Corker, 25 Ga. 479.
- 10 Kinkad, 3 Biss. 405, 410; Breit v. Yeaton, 101 Ill. 242, 263; Tyberand v. Raucke, 96 Ill. 71; Tomlinson v. Matthews, 93 Ill. 182; Hamilton, 89 Ill. 349, 351; Whitford v. Daggett, 84 Ill. 144; Hackett v. Bailey, 86 Ill. 74; Brooks v. Keans, 86 Ill. 547, 549; Morris v. Tillson, 81 Ill. 607; Hagebust v. Rogland, 78 Ill. 40; Doyle v. Kelley, 75 Ill. 574; Patton v. Gates, 67 Ill. 164; Wartman v. Price, 47 Ill. 22; Hessing v. McClosky, 37 Ill. 342; Brownell v. Dixon, 37 Ill. 197; Finlay v. Dickerson, 29 Ill. 9; Powers v. Green, 14 Ill. 387.
- 11 Sims v. Ricketts, 35 Ind. 131, 190-194; 9 Am. Rep. 679; Line v. Blizzard 70 Ind. 25; Buchanan v. Lee, 69 Ind. 117; Sherman v. Hogland, 54 Ind. 578; Brookbank v. Kennard, 41 Ind. 339; Brick v. Scott, 47 Ind. 299; Kinneman v. Pyle, 44 Ind. 275; Rawell v. Klein, 44 Ind. 230; Nixon v. Cuffy, 33 Ind. 211; Maltos v. Highshue, 39 Ind. 95.
- 12 Lenton v. Crosby, 54 Iowa, 471; Courtwright, 53 Iowa, 57; Robertson, 25 Iowa, 350, 355; McMullen, 10 Iowa, 412; Wright, 16 Iowa, 436; Logan v. Hull, 19 Iowa, 491.
- 13 Greer, 24 Kan. 101, 104; Horder, 23 Kan. 391; Dickson v. Randall 19 Kan. 212; Faddis v. Woodmells, 10 Kan. 53; Monroy v. May, 9 Kan. 466; Going v. Orns, 8 Kan. 85.
- 14 Scarborough v. Watkins, 9 Mon. B. 540, 545; 50 Am. Dec. 528; Barnaby, 14 Bush, 485; Campbell v. Galbreath, 12 Bush, 459; Powell, 5 Bush, 619, 620; Latimer v. Glenn, 2 Bush, 543; Kinniard v. Daniels, 13 Mon. B. 496.
- 15 Ames, 33 La. An. 1317; Lehman v. Levy, 30 La. An. 745; Willis v. Ward, 30 La. An. 1282; Newman v. Eaton, 27 La. An. 341; Warfield v. Bobo, 21 La. An. 466.
- 16 Blake, 64 Me. 177, 181; Bond v. Cummings, 70 Me. 125; French v. Holmes, 67 Me. 186; Grant v. Ward, 64 Me. 239; McKee v. Garcelon, 60 Me. 167; 11 Am. Rep. 200; Randall v. Lunt, 51 Me. 246; Allen v. Hooper, 50 Me. 371, 374; Winslow v. Gilbreth, 50 Me. 90; Motley v. Sawyer, 34 Me. 540; 33 Me. 68; Johnson v. Stillings, 35 Me. 427; Davis v. Herrick, 37 Me. 397.
- 17 Sabel v. Slinghiff, 52 Md. 132, 134; Thomas v. Standiford, 49 Md. 181, 185; Odenhal v. Devlin, 48 Md. 439, 446; Trader v. Lowe, 45 Md. 1, 14; Keller, 45 Md. 270, 277; Drury v. Briscoe, 42 Md. 154, 162; Myers v. King, 42 Md. 65, 70; Gebb v. Rose, 40 Md. 387, 392; Hill, 38 Md. 183, 185; Preston v. Fryer, 38 Md. 221, 225; Barton, 32 Md. 214, 224; Mayfield v. Kilgour, 31 Md. 240, 244; Kuhn v. Stanfield, 28 Md. 210, 215; Jones, 18 Md. 464, 468; McCubbin v. Patterson, 16 Md. 179, 185; Stockett v. Halliday, 9 Md. 480, 498; Bowie v. Stonestreet, 6 Md. 418, 430; Crane v. Barkdoll, 59 Md. 534, 535.
- 18 Fellows v. Smith, 130 Mass. 373; Cowen v. Donaldson, 128 Mass. 169; Degnan v. Farr, 126 Mass. 207, 298; Hawkins v. Providence Railroad, 119 Mass. 596; 20 Am. Rep. 353; Whitney v. Wheeler, 116 Mass. 490; Towle, 114 Mass. 167; Bassett, 112 Mass. 99, 100; Bancroft v. Curtis, 103 Mass. 47; Abbott v. Winchester, 105 Mass. 115; Chapman v. Kel-

logg, 102 Mass. 246, 248; Knowles v. Hull, 99 Mass. 562, 564; Jackson v. Parks, 10 Cush. 550; Lord v. Parker, 3 Allen, 127, 129; Carley v. Green, 12 Allen, 104, 106; Motte v. Alger, 15 Gray, 322, 323.

19 Hyde v. Powell, 47 Mich. 156; Randall, 37 Mich. 563, 571; Jenne v. Marble, 37 Mich. 319, 321; Loomis v. Brush, 36 Mich. 40, 46; Ransom, 30 Mich. 328, 330; Deories v. Conklin, 22 Mich. 255; Burdeno v. Amperse, 14 Mich. 91, 97; Watson v. Thurber, 11 Mich. 457.

20 Sandford v. Johnson, 24 Minn. 172; Tullis v. Firdley, 9 Minn. 79.

21 Gregory v. Dodds, 60 Miss. 549, 552; Chaffe v. Benvit, 60 Miss. 34, 38; Memphis v. Scruggs, 50 Miss. 244; Kaufman v. Whitney, 50 Miss. 103; Thoms, 45 Miss. 263; Butterfield v. Stanton, 44 Miss. 15.

22 Morrison v. Thistle, 67 Mo. 596, 601; Tennison, 46 Mo. 77; Frissel v. Rozier, 19 Mo. 448, 449.

23 Omaha v. Bartlett, 8 Neb. 319; Aultman v. Obermeyer, 6 Neb. 260, 264.

24 Nev. Rev. 1873, § 169.

25 Cough v. Russell, 55 N. H. 279; Houston v. Clark, 50 N. H. 479; Russ v. George, 45 N. H. 467, 468; Patterson, 45 N. H. 164, 166; Albin v. Lord, 39 N. H. 196, 203; Jewell v. Porter, 31 N. H. 34, 38; Burleigh v. Coffin, 22 N. H. 118, 127.

26 Woodruff v. Clark, 42 N. J. L. 198; Skillman, 13 N. J. Eq. 403.

27 Whitaker, 52 N. Y. 370, 373; Woodworth v. Sweet, 51 N. Y. 8, 11; Jaycox v. Caldwell, 51 N. Y. 315, 398; Winans v. Peebles, 32 N. Y. 423, 426; White v. Wager, 25 N. Y. 328, 332; Abbey v. Dego, 44 Barb. 374, 380; Damon v. Hall, 38 Barb. 140; Savage v. O'Neill, 42 Barb. 378; 44 N. Y. 298; Wright, 59 Barb. 527, 528; Perkins, 62 Barb. 406; Zimmerman v. Erhard, 58 How. Pr. 11; Kelly v. Case, 18 Hun, 472; Townshend, 1 Abb. N. C. 81; Seymour v. Fellows, 53 How. Pr. 471; Van Order, 8 Hun, 315; Meeker v. Wright, 11 Hun, 535; Livingston, 2 Johns. Ch. 538.

28 Warlick v. White, 86 N. C. 130; 41 Am. Rep. 453; Reucher v. Winne, 86 N. C. 268, 275; George v. High, 85 N. C. 99; Dula v. Young, 70 N. C. 450; Kee v. Vassar, 2 Ired. Eq. 553.

29 Crooks, 34 Ohlo St. 610; Huston v. Cone, 24 Ohlo St. 11; Oliver v. Moore, 23 Ohlo St. 473; 26 Ohio St. 298; Smiley, 18 Ohio St. 543, 544; Fowler v. Trebeln, 16 Ohio St. 493, 497.

30 Elfelt v. Heach, 5 Oreg. 255.

31 Flattery, 91 Pa. St. 474; Bedell, 87 Pa. St. 510; Kelly, 86 Pa. St. 232; Darlington, 86 Pa. St. 512; 27 Am. Rep. 726; Morris v. Zeigler, 71 Pa. St. 450; Vance v. Nagle, 70 Pa. St. 176; Winch v. James, 68 Pa. St. 217; Ammon, 63 Pa. St. 297; Crawford, 61 Pa. St. 52; Berger, 60 Pa. St. 408; Ylcker v. Martin, 50 Pa. St. 138; Hitner, 54 Pa. St. 114; Johnston, 31 Pa. St. 450, 453; Bear, 33 Pa. St. 525, 527; Coates v. Gerlach, 44 Pa. St. 45; Miller, 44 Pa. St. 170; Dillinger, 35 Pa. St. 357; Hutton v. Duey, 3 Pa. St. 100, 105.

32 Steadman v. Wilbur, 7 R. I. 481.

33 Wade v. Fisher, 9 Rich. Eq. 294; Hodges v. Cobb, 8 Rich. 50; Reeder v. Flynn, 6 S. C. 216.

34 McCampbell, 2 Lea, 661, 664; Pile, 6 Lea, 508; 40 Am. Rep. 50.

35 Wellborn v. Oddfellow, 56 Tex. 501; Hall, 52 Tex. 294; 36 Am. Rep. 725; Ximines v. Smith, 39 Tex. 49; Hutchlusion v. Mitchell, 39 Tex. 487.

36 Leavitt v. Jones, 54 Vt. 423; 41 Am. Rep. 849; Cardell v. Rider, 35 Vt. 47; Pierce, 25 Vt. 511; Barron, 24 Vt. 375, 398.

H. & W. — 6.

37 *Johnston v. Gill*, 27 Gratt. 587; *Findley* 11 Gratt. 434; *Jones v. Obenchain*, 10 Gratt. 259; *Lewis v. Carpenter* 8 Gratt. 148; *Charles*, 8 Gratt. 486.

38 *Fox v. Jones*, 1 W. Va. 205.

39 *Wochaska*, 45 Wis. 423; *Carpenter v. Tatro*, 36 Wis. 297; *Beard v. Dedolph* 20 Wis. 136.

40 *Post*, §§ 99-134.

## ART. III — WRONGS BETWEEN HUSBAND AND WIFE

§ 47. Classified.

§ 48. Civil wrongs.

§ 49. Criminal wrongs.

§ 47. **Wrongs between husband and wife classified.**— Wrongs between husband and wife may be civil or criminal,<sup>1</sup> to person or to property.<sup>2</sup> The tendency of modern law is towards criminal liability and civil immunity for wrongs to person,<sup>3</sup> and civil liability and criminal immunity for wrongs to property.<sup>4</sup> Thus, a wife cannot recover damages from her husband for beating her,<sup>5</sup> but the State will punish him therefor;<sup>6</sup> and a husband cannot steal his wife's property,<sup>7</sup> but may be held civilly responsible therefor.<sup>8</sup>

1 *Abbott* 67 Me. 304, 306, 307; 24 Am. Rep. 27; *post*, §§ 48, 49.

2 *Minier*, 4 Lans. 421, 422, 423; *post*, §§ 43, 43.

3 See *Phillips v. Barnett*, 1 Q. B. Div. 436, 439; *Peters*, 42 Iowa, 183, 184; *Abbott*, 67 Me. 304, 306; 24 Am. Rep. 27; *Libby v. Berry*, 74 Me. 286, 288; *Commonw. v. McAfee*, 108 Mass. 455; *Adams*, 100 Mass. 365, 369; *Bradley v. State*, 1 Miss. 156, 157; *Morris v. Palmer*, 30 N. H. 123, 126; *Freethy*, 42 Barb. 641, 645; *Longendyke*, 44 Barb. 366, 368; *Minier*, 4 Lans. 421, 422; *State v. Mabrey*, 61 N. C. 592, 593; *State v. Oliver*, 70 N. C. 60, 61; *Whipp v. State*, 31 Ohio St. 87, 88; 32 Am. Rep. 359; *Gorman v. State*, 42 Tex. 221; *Commonw. v. Barry*, 2 Green Cr. R. 285, 289 *n*; *People v. Winter*, 2 Parker Cr. R. 10.

4 See *Queen v. Kenny*, 2 Q. B. Div. 307, 311; *Reg. v. Tolfree*, 1 Moody C. C. 243; *Rex v. Willis*, 1 Moody C. C. 375; *Reg. v. Glassie*, 7 Cox C. C. 1; *Regina v. Muters*, 10 Cox C. C. 59; *Reg. v. Avery*, 5 U. C. L. J. 215; *Bell C. C.* 159; *Thomas*, 51 Ill. 162, 165; *Lamphier v. State*, 70 Ind. 317, 324; *State v. Banks*, 48 Ind. 197, 199; *Peters*, 42 Iowa, 183, 184; *Commonw. v. Hartnett*, 3 Gray, 450; *Snyder v. People*, 26 Mich. 106, 108, 111; 12 Am. Rep. 302; *Minier*, 4 Lans. 421, 423; *Walker v. Reamy*, 36 Pa. St. 410, 414; *Overton v. State*, 43 Tex. 616, 618.

5 *Abbott*, 67 Me. 304, 306; 24 Am. Rep. 27; *post*, § 48.

6 *State v. Oliver*, 70 N. C. 60, 61; *post*, § 49.

7 *Thomas*, 51 Ill. 162, 165; *post*, § 49.

8 See *Larison*, 9 Ill. App. 27, 31; *Clayton*, 32 Ill. 493, 498; *Peters*, 42 Iowa, 183, 184; *Black*, 30 N. J. Eq. 215; *Minier*, 4 Lans. 421, 422; *Cantrell*, 3 Tenn. Ch. 426, 430; *post*, §§ 48, 51, 54.

§ 48. Civil wrongs between husband and wife. — Matrimonial offenses modify the normal rights and obligations of married persons,<sup>1</sup> and form the basis of matrimonial suits.<sup>2</sup> Some of these matrimonial offenses might be civil wrongs to the person between strangers,<sup>3</sup> but between husband and wife they give no right of action in tort.<sup>4</sup> Husband and wife are one,<sup>5</sup> and marriage is a perpetually operating discharge of rights arising from personal wrongs.<sup>6</sup> Thus, one spouse cannot recover damages against the other for slander,<sup>7</sup> or assault and battery.<sup>8</sup> A husband has no right to assault his wife,<sup>9</sup> but her remedy lies in an action for divorce for cruelty,<sup>10</sup> in criminal proceedings,<sup>11</sup> in suing out articles of the peace<sup>12</sup> at his expense,<sup>13</sup> and formerly in a writ of *supplicavit*.<sup>14</sup> He has no right to shut her up,<sup>15</sup> but her remedy is by writ of habeas corpus,<sup>16</sup> nor does a right of action arise after the marriage has been dissolved by divorce,<sup>17</sup> or death;<sup>18</sup> the question is not one of procedure but one of substantial right.<sup>19</sup> As to property, however, the separate existence of husband and wife is recognized in equity<sup>20</sup> and by statutes;<sup>21</sup> and the wife may have an injunction to protect her estate from her husband,<sup>22</sup> and a writ of ejectment if he excludes her from her real estate,<sup>23</sup> and under express statute full power to sue her husband for any injury to her property;<sup>24</sup> but the rules, that married women statutes do not affect the relation of husband and wife,<sup>25</sup> and that property statutes do not affect personal rights,<sup>26</sup> are applied, and a statute securing to a married woman her separate property does not enable her to sue her husband in trespass or trover for breaking or removing her furniture.<sup>27</sup> As to a husband suing his wife, he is liable for her torts himself.<sup>28</sup> As to antenuptial torts, they are completely discharged by marriage.<sup>29</sup> (Remedies are discussed under suits between husband and wife.<sup>30</sup>)

- 1 Stewart M. & D. §§ 165, 175-180.
- 2 Stewart M. & D. index, MATRIMONIAL SUITS.
- 3 Stewart M. & D. §§ 178, 261-273, 283.
- 4 Phillips v. Barnet, 1 Q. B. Div. 436, 438, 439; Peters, 42 Iowa, 183, 184; Abbott, 67 Me. 304, 306; 24 Am. Rep. 27; Libby v. Berry, 74 Me. 286, 288; Freethy, 42 Barb. 641, 645; Longendyke, 44 Barb. 366, 368; Perkins, 62 Barb. 530; Minier, 4 Lans. 421, 422; Shuttleworth, 55 N. Y. 625; Walker v. Reamy, 36 Pa. St. 410, 414.
- 5 Phillips v. Barnet, 1 Q. B. Div. 436, 438, 439; Abbott, 67 Me. 304, 306.
- 6 Abbott, 67 Me. 304, 307; 24 Am. Rep. 27.
- 7 Abbott, 67 Me. 304, 303; 24 Am. Rep. 27; Freethy, 42 Barb. 641, 645.
- 8 Phillips v. Barnet, 1 Q. B. Div. 436, 439; Peters, 42 Iowa, 183, 184; Libby v. Berry, 74 Me. 286, 288; Abbott, 67 Me. 304, 306; 24 Am. Rep. 27; Longendyke, 44 Barb. 366, 363; Schultz, 89 N. Y. 684; Com. v. Barry, 2 Green Cr. R. 235, 238 n.
- 9 Knight, 31 Iowa, 451, 459; Stewart M. & D. § 270; Desty Crim. L. § 130 i.
- 10 Stewart M. & D. §§ 261-273.
- 11 *Post*, § 49.
- 12 Phillips v. Barnet, 1 Q. B. Div. 436, 438; Morris v. Palmer, 39 N. H. 123, 127.
- 13 Morris v. Palmer, 39 N. H. 123, 123; Stewart M. & D. § 389.
- 14 Adams, 100 Mass. 365, 369; 1 Am. Rep. 111.
- 15 Kelly, Law R. 2 Pro. & D. 31, 32; *post*, § 62.
- 16 Abbott, 67 Me. 304, 307; 24 Am. Rep. 27.
- 17 Phillips v. Barnet, 1 Q. B. Div. 436, 439; Abbott, 67 Me. 304, 306, 309; 24 Am. Rep. 27; Stewart M. & D. § 442.
- 18 Phillips v. Barnet, 1 Q. B. Div. 436, 410.
- 19 Phillips v. Barnet, 1 Q. B. Div. 436, 438, 439; Abbott, 67 Me. 304, 306; 24 Am. Rep. 27.
- 20 *Ante*, §§ 38, 42.
- 21 *Ante*, §§ 38, 43.
- 22 See Heck v. Vollmer, 29 Md. 507, 511.
- 23 Minier, 4 Lans. 421, 422.
- 24 Larison, 9 Ill. App. 27, 31; see Peters, 42 Iowa, 183, 184.
- 25 *Ante*, § 16.
- 26 *Ante*, § 15.
- 27 Walker v. Reamy, 36 Pa. St. 410, 414. Consult Snyder v. People, 25 Mich. 106, 108, 111; 12 Am. Rep. 302; *ante*, §§ 15, 16.
- 28 Abbott, 67 Me. 306, 309; 24 Am. Rep. 27; *post*, § 66. Consult *post*, §§ 52-56; Berdell v. Parkhurst, 19 Hun, 358, 360.
- 29 Inference from Abbott, 67 Me. 306, 307; 24 Am. Rep. 27; and cases in n. 4, *supra*.
- 30 *Post*, §§ 52, 56.

§ 49. Criminal wrongs between husband and wife.—  
Matrimonial offenses—such as adultery,<sup>1</sup> desertion,<sup>2</sup>



cruelty,<sup>3</sup> defamation<sup>4</sup>—not only affect the normal status of husband and wife,<sup>5</sup> and are grounds for divorce,<sup>6</sup> but they are crimes—offenses against the State.<sup>7</sup> Thus, prosecutions of husband for assault and battery on wife are common,<sup>8</sup> and of wife for assault and battery on husband not unknown.<sup>9</sup> But the State leaves the parties to arrange their property rights between themselves by agreement,<sup>10</sup> or by suit.<sup>11</sup> So one spouse cannot steal from the other<sup>12</sup>—but *quære*, if they are living apart<sup>13</sup>—and even a third party, who joins with an adulterous wife<sup>14</sup> in taking possession of her husband's property, is not guilty,<sup>15</sup> unless he took part in the asportation.<sup>16</sup> So one spouse is not guilty of arson in burning the other's house.<sup>17</sup> Married women statutes have not changed the common law as to crimes between husband and wife.<sup>18</sup>

1 Stewart M. & D. §§ 156, 178, 241-249, 345.

2 Stewart M. & D. §§ 177, 249-260.

3 Stewart M. & D. §§ 178, 261-273, 345.

4 Stewart M. & D. §§ 267, 269, 283.

5 Stewart M. & D. §§ 165, 175-180.

6 Stewart M. & D. §§ 231, 239-290.

7 Whipp v. State, 34 Ohio St. 87, 88, 91; 32 Am. Rep. 359.

8 See Bradley v. State, 1 Miss. 156, 157; State v. Mabrey, 64 N. C. 532, 593; State v. Driver, 78 N. C. 423, 425; Gorman v. State, 42 Tex. 521; Desty Crim. L. § 130 f.

9 Whipp v. State, 34 Ohio St. 87, 88; 32 Am. Rep. 359.

10 Ante, §§ 40-46; Stewart M. & D. §§ 131-132.

11 Ante, § 48.

12 Queen v. Kenny, 2 Q. B. Div. 307, 311; Reg. v. Tolfree, 1 Moody C. C. 243; Rex v. Willis, 1 Moody C. C. 375; Reg. v. Glassie, 7 Cox C. C. 1; Reg. v. Muttons, 10 Cox C. C. 50; Reg. v. Avery, 5 U. C. L. J. 215; Bell C. C. 159; Thomas, 51 Ill. 162, 165; Lamphier v. State, 70 Ind. 317, 324; State v. Banks, 48 Ind. 197, 199; Commonwealth v. Hartnett, 3 Gray, 450; Snyder v. People, 26 Mich. 106, 108, 111; 12 Am. Rep. 302; State v. Parker, 26 Alb. L. J. 423; Walker v. Reamy, 36 Pa. St. 410, 414; Overton v. State, 43 Tex. 616, 618.

13 Lamphier v. State, 70 Ind. 317, 321; State v. Banks, 48 Ind. 197, 199.

14 Queen v. Kenny, 2 Q. B. Div. 307, 311; State v. Banks, 48 Ind. 197, 199.

15 Reg. v. Taylor, 12 Cox C. C. 627; 2 Green Cr. R. 32; Reg. v. Featherstone, 6 Cox C. C. 576; 2 Lead. C. C. 362.

16 *Desty* Crim. L. § 145 *t*, and cases there cited.

17 *Snyder v. People*, 26 Mich. 106, 108, 111 ; 12 Am. Rep. 392.

18 *Thomas*, 51 Ill. 162, 165 ; *Snyder v. People*, 26 Mich. 106, 108, 111 ; 12 Am. Rep. 392 ; *Walker v. Reamy*, 36 Pa. St. 410, 414.

#### ARTICLE IV.—WILLS BETWEEN HUSBAND AND WIFE.

§ 50. Effect of, generally.

§ 51. Miscellaneous points as to.

§ 50. Effect of wills between husband and wife generally.—A husband could always will his property to his wife as to a stranger, for his will takes effect only on his death, by which the marriage unity is destroyed.<sup>1</sup> But a wife is merged in her husband,<sup>2</sup> and cannot make a will at all,<sup>3</sup> except under a power,<sup>4</sup> or by virtue of a statute,<sup>5</sup> or in a representative capacity ;<sup>6</sup> and therefore, except in such cases, cannot will to her husband.<sup>7</sup> A general power in a settlement to will enables her to will to her husband.<sup>8</sup> A general statute authorizing "any person" to make a will does not include married women.<sup>9</sup> A statute authorizing a married woman to make a will, generally, authorizes her to will to her husband,<sup>10</sup> for there is no additional incapacity due to the marriage relation,<sup>11</sup> as there is in the case of contracts between husband and wife.<sup>12</sup> But a statute enabling her to make a will, provided it does not "affect the rights of her husband," excludes a will to her husband,<sup>13</sup> as does, probably, a statute enabling her to will only with her husband's consent.<sup>14</sup> In some States wills in favor of husband or wife are prohibited;<sup>15</sup> in some, one can will only a portion of his or her estate to the other ;<sup>16</sup> in some a widow<sup>17</sup> or widower<sup>18</sup> must elect to take either what the will gives or what the law allows.<sup>19</sup> The effect of the will depends on the law existing at the time of the testator's death.<sup>20</sup>

1 See Litt. § 163; 1 Bish. M. W. § 37; *Morse v. Thompson*, 4 Cush. 562, 567; *Burdano v. Amperse*, 14 Mich. 90, 93; *Wakefield v. Phelps*, 37 N. H. 295, 302.

2 *Ante*, § 38.

3 *Scammel v. Wilkinson*, 2 East, 552, 555; *Fitch v. Brainerd*, 2 Day, 163, 185; discussed fully *post*, WILLS OF MARRIED WOMEN, §§ 5-10, 354.

4 *Bradish v. Gibbs*, 3 Johns. Ch. 523, 535, 536, 540. See *Kennell v. Abbott*, 4 Ves. 802, 803; *Douglas v. Cooper*, 3 Mylne & K. 378, 381; *Hodsdon v. Lloyd*, 2 Bro. C. C. 540, 544; *Morse v. Thompson*, 4 Cush. 562, 568; *post*, § 42.

5 *Fitch v. Brainerd*, 2 Day, 163, 180; *Morse v. Thompson*, 4 Cush. 562, 568; *Wakefield v. Phelps*, 37 N. H. 295, 301, 302; *infra*, notes 10-14.

6 *Scammel v. Wilkinson*, 2 East, 552, 557. See *post*, § 342.

7 Co. Litt. 112 b; 1 Bish. M. W. § 37; *Hood v. Archer*, 1 McCord, 225, 226, 477, 478; *Newell*, 2 McCord, 453, 454.

8 *Bradish v. Gibbs*, 3 Johns. Ch. 523, 535, 536, 540. See *Kennell v. Abbott*, 4 Ves. 802, 803; *Morse v. Thompson*, 4 Cush. 562, 568.

9 *Fitch v. Brainerd*, 2 Day, 163, 190; *Osgood v. Breed*, 12 Mass. 525, 530; *Morse v. Thompson*, 4 Cush. 562, 563; *ante*, § 12.

10 See *Wakefield v. Phelps*, 37 N. H. 295, 301, 302; *Morse v. Thompson*, 4 Cush. 562, 567, dissenting opinion.

11 *Morse v. Thompson*, 4 Cush. 562, 567. Compare *Burdano v. Amperse*, 14 Mich. 90, 93.

12 *Ante*, § 43.

13 *Morse v. Thompson*, 4 Cush. 562, 565. See *Wakefield v. Phelps*, 37 N. H. 295, 305.

14 *Morse v. Thompson*, 4 Cush. 562, 566. See *Hood v. Archer*, 1 McCord, 225, 226, 477, 478. Compare *ante*, § 43, notes 13, 14, 15.

15 See *Adams v. Kellogg*, Kirby, 195; *Sanborn v. Batchelder*, 51 N. H. 426, 431.

16 Colo. C. L. 1877, § 1751; *Ames*, 33 La. An. 1317, 1329.

17 *Collins v. Carman*, 5 Md. 503, 528.

18 *Huston v. Cone*, 24 Ohio St. 11, 20, 22.

19 ELECTION considered fully *post*, § 275.

20 *Wakefield v. Phelps*, 37 N. H. 295, 306; *ante*, §§ 22, 36.

§ 51. Miscellaneous points as to wills between husband and wife.—A man's will is revoked by his subsequent marriage and the birth of issue,<sup>1</sup> unless it provides for such issue<sup>2</sup> or issue by a former marriage.<sup>3</sup> A woman's will is revoked by her subsequent marriage alone,<sup>4</sup> unless by statute she has full power to make a will as a married woman,<sup>5</sup> in which case her will is revoked as a man's is.<sup>6</sup> This subject is not treated in this article.<sup>7</sup> A devise to "my wife" means, in case of several wives,

the wife at the time the will was made;<sup>8</sup> if there was no wife at such time, but the testator made his will and died just on the eve of marriage, his intended wife takes.<sup>9</sup> A devise to "my wife" is void if the woman had deceived the testator into thinking her his wife;<sup>10</sup> so with a devise to "my husband."<sup>11</sup> Generally devises and legacies to husband or wife are construed as other devises are.<sup>12</sup>

1 Wellington, 4 Burr. 2165, 2171; Doe v. Lancashire, 5 Term Rep. 49, 63; Marston v. Roe, 8 Ad. & E. 14, 55; Hodsdon v. Lloyd, 2 Bro. C. C. 540, 544; Brush v. Wilkins, 4 Johns. Ch. 506, 510, 512, 516; 1 Jarman Wills, 122, *et seq.*

2 Marston v. Roe, 8 Ad. & E. 14, 54; Brush v. Wilkins, 4 Johns. Ch. 506, 510.

3 Yerby, 3 Call. 239, 295.

4 Forse v. Hembling, 4 Rep. 60, 61; Douglas v. Cooper, 3 Mylne & K. 378, 381; Hodsdon v. Lloyd, 2 Bro. C. C. 540, 541; *post*, § 351.

5 Tuller, 79 Ill. 99, 103; Morton v. Onion, 45 Vt. 145, 153.

6 Tuller, 79 Ill. 99, 103.

7 Revocation of man's will is not treated in the volume because it does not depend on marriage, *supra*, n. 1; revocation of woman's is discussed fully, *post*, §§ 350, 351.

8 Neblock v. Garratt, 1 Russ. & M. 629, 630; Franks v. Brooker, 27 Beav. 635.

9 Schloss v. Stiebel, 6 Sim. 1, 5.

10 Wilkinson v. Joughlin, Law R. 2 Eq. 319, 322.

11 Kennell v. Abbott, 4 Ves. 892, 893.

12 Orrick v. Boehm, 49 Md. 72, 101.

## ARTICLE V.—SUITS BETWEEN HUSBAND AND WIFE.

§ 52. Scope of this article.

§ 53. Suits under unwritten law.

§ 54. Suits under statutes.

§ 55. Suits after dissolution of marriage.

§ 55 a. Defenses in suits.

§ 56. Testimony of husband or wife.

§ 52. Scope of this article.—Criminal prosecutions are never suits between husband and wife, and, except so far as concerns capacity of husband and wife to testify in them, are not discussed in this article. Suits between husband and wife are ordinary suits at law or

in equity, *in personam* or *in rem*, in contract or in tort, such as are brought between strangers, which are discussed in this article;<sup>1</sup> and suits based upon the marriage relation, called matrimonial suits, which are not treated in this volume.<sup>2</sup> A section on the capacity of husband and wife to testify the one for or against the other is inserted here.<sup>3</sup>

1 *Post*, §§ 53-56.

2 Discussed in Stewart M. & D. §§ 122, 123 *a*, 133-147, 175, 179, 182, 193, 202-211, 353-399, 400-407.

3 *Post*, § 57.

§ 53. Suits between husband and wife under the unwritten law.—In courts of law, independently of statute,<sup>1</sup> suits between husband and wife are wholly unknown,<sup>2</sup> because in such courts husband and wife are one,<sup>3</sup> and cannot be under obligation, the one to the other, by contract,<sup>4</sup> or tort.<sup>5</sup> But courts of equity which have always recognized the separate existence of husband and wife,<sup>6</sup> and have always had special jurisdiction over the property of married women,<sup>7</sup> enforce such obligations as husband and wife can reciprocally incur,<sup>8</sup> and which cannot be enforced at law.<sup>9</sup> In such cases the wife is represented by a next friend or trustee.<sup>10</sup> Thus, at law a man cannot even confess judgment in favor of his wife;<sup>11</sup> but when courts of law and of equity are combined as in Pennsylvania, he can.<sup>12</sup> A wife cannot sue out a writ of *scire facias* against her husband on a decree for alimony.<sup>13</sup> A husband cannot sue his wife at law on a covenant to pay rent.<sup>14</sup> One cannot sue the other for assault and battery.<sup>15</sup> But in courts of equity fair contracts on proper consideration, antenuptial or postnuptial, are enforced.<sup>16</sup> So a wife may in equity institute proceedings against her husband for the protection of her property;<sup>17</sup> or for a suitable provision out of her choses in

action which he is therein seeking to reduce to possession,<sup>18</sup> or to make him account;<sup>19</sup> or to have him removed from a trust;<sup>20</sup> in seeking to enjoin his creditors from seizing her property she may make him a party defendant;<sup>21</sup> she may file her claim against his insolvent estate;<sup>22</sup> or a bill against him for partition;<sup>23</sup> or a bill against him for cancellation of a contract.<sup>24</sup> So a husband may, in equity, hold a wife responsible for money of his appropriated by her.<sup>25</sup> The rule preventing suits at law between husband and wife does not, however, prevent him from being made her garnishee,<sup>26</sup> or an old *Doe v. Roe* ejectment suit between them.<sup>27</sup>

1 Peters, 42 Iowa, 182, 183; *post*, § 54.

2 See 1 Blackst. Com. 120; 2 Kent Com. 129; *Doe v. Daley*, 8 Q. B. 934, 938; *Countz v. Markling*, 30 Ark. 17, 24; *Chesnut*, 77 Ill. 346, 351; *Larison*, 9 Ill. App. 27, 31; *Peters*, 42 Iowa, 182, 184; *Hobbs*, 70 Me. 177, 182; *Barton*, 32 Md. 214, 224; *Jenne v. Marble*, 37 Mich. 319, 323; *Walter*, 48 Mo. 140, 145; *Longendyke*, 41 Barb. 336, 337; *Pittman*, 4 Oreg. 298, 300; *Ros v. Latshaw*, 90 Pa. St. 238, 240; *Cantrell v. Davidson*, 3 Tenn. Ch. 426, 430.

3 *White v. Wager*, 25 N. Y. 325, 329; *ante*, § 38.

4 *Scarborough v. Watkins*, 9 Mon. B. 549, 545; 50 Am. Dec. 528; *ante*, § 41.

5 *Libby v. Berry*, 74 Me. 286, 288; *ante*, § 48.

6 *Morrison v. Thistle*, 67 Mo. 596, 601; *ante*, §§ 8, 33, 43.

7 *Bridges v. McKenna*, 14 Md. 258, 267; *ante*, § 42; *post*, §§ 197-217.

8 See *ante*, §§ 40-49.

9 See *Larison*, 9 Ill. App. 27, 30, 31; *Frazier v. White*, 49 Md. 1, 7; *Cantrell v. Davidson*, 3 Tenn. Ch. 426, 430; *post*, § 54.

10 *Story Eq. Pl.* §§ 61, 63; *Barton*, 32 Md. 214, 224; *Heck v. Vollmer*, 29 Md. 507, 511; *Bridges v. McKenna*, 14 Md. 258, 270; *Freethy*, 42 Barb. 641; *post*, SUITS OF MARRIED WOMEN.

11 *Countz v. Markling*, 30 Ark. 17, 21.

12 *Rose v. Latshaw*, 90 Pa. St. 238, 240; *Lahr*, 90 Pa. St. 507, 511.

13 *Chesnut*, 77 Ill. 346, 350. Consult *Stewart M. & D.* § 378.

14 *Jenne v. Marble*, 37 Mich. 319, 323.

15 *Abbott*, 67 Me. 304, 306; 24 Am. Rep. 27; *ante*, § 48.

16 *Crane v. Gough*, 4 Md. 316, 331; *Bennett v. Winfield*, 4 Helsk. 440, 445; *ante*, §§ 42, 44.

17 *Walter*, 48 Mo. 140, 145; *Birdges v. Phillips*, 25 Ala. 136; 60 Am. Dec. 435; *Crabb v. Thomas*, 25 Ala. 212. See *post*, § 210.

18 *Wiles*, 3 Md. 1, 8; 56 Am. Dec. 733; see *post*, §§ 190-196.

19 *Whitman v. Abernathy*, 33 Ala. 154, 161.

- 20 Bryan, 35 Ala. 290, 291.
- 21 Bridges v. McKenna, 14 Md. 258, 270.
- 22 Oswald v. Hoover, 43 Md. 360, 368.
- 23 Moore, 47 N. Y. 467, 469; 7 Am. Rep. 466.
- 24 Hardin v. Gerard, 10 Bush, 259, 261.
- 25 Davidson v. Smith, 20 Iowa, 466, 468.
- 26 Odenhal v. Devlin, 48 Md. 439, 446.
- 27 Doe v. Daley, 8 Q. B. 934, 938.

§ 54. Suits between husband and wife under statutes.— Some statutes expressly authorize suits between husband and wife;<sup>1</sup> such statutes give a remedy but no new right.<sup>2</sup> Thus, a statute enabling a married woman to sue her husband does not enable her to sue him for a personal injury to herself,<sup>3</sup> for that a husband is not liable to his wife is not a mere question of procedure but of substantial right.<sup>4</sup> Statutes authorizing a married woman to sue and be sued generally as a *femme sole* do not authorize suits by and against her husband,<sup>5</sup> though this rule is sometimes ignored.<sup>6</sup> Statutes authorizing suits with her husband respecting property do not authorize such suits for personal contracts<sup>7</sup> or torts.<sup>8</sup> Still, if she has the general power to sue as if unmarried, she may in all cases sue her husband in equity,<sup>9</sup> where the unity of husband and wife is not regarded.<sup>10</sup> When a statute gives a new remedy at law, it does not destroy the old remedy in equity;<sup>11</sup> but if it gives a new right, enforceable at law, such right cannot be enforced in equity.<sup>12</sup> Under various statutes we find a wife suing her husband in detinue,<sup>13</sup> in replevin,<sup>14</sup> and as garnishee;<sup>15</sup> and a husband suing his wife in trover.<sup>16</sup>

1 Miss. R. S. 1880, § 1168; Wilson, 36 Cal. 447, 454. As to the various statutes, see citations, *infra*, and Boyd v. England, 56 Ga. 598; Angele v. Sentimanat, 33 La. An. 609; Vredenburg v. Behan, 32 La. An. 475; Simmons v. Thomas, 43 Miss. 36; 5 Am. Rep. 470; Adams, 24 Hun, 401; Rohrman, 12 Phila. 390; Williams, 47 Pa. St. 307.

2 Peters, 42 Iowa, 182, 183.

3 Libby v. Berry, 74 Me. 286, 288; Peters, 42 Iowa, 182, 183.

4 Phillips v. Barnet, 1 Q. B. Div. 436, 438, 439; Abbott, 67 Me. 334, 306; 24 Am. Rep. 27; *ante*, § 48.

5 See Smith v. Gorman, 41 Me. 405, 408; Libby v. Berry, 74 Me. 286, 288; Barton, 32 Md. 214, 224; Freethy, 42 Barb. 641, 645; *ante*, §§ 16, 43, 48.

6 See Emerson v. Clayton, 32 Ill. 493, 498; *ante*, §§ 43, 48.

7 Chesnut, 77 Ill. 346, 350; Jenne v. Marble, 37 Mich. 319, 323; Pittman, 4 Oreg. 298, 300; *ante*, § 15.

8 Peters, 42 Iowa, 182, 183; Libby v. Berry, 74 Me. 286, 288; *ante*, § 15.

9 Barton, 32 Md. 214, 224.

10 *Ante*, §§ 8, 38, 42, 53.

11 Bridges v. McKenna, 14 Md. 258, 270.

12 Larison, 9 Ill. App. 27, 30, 31.

13 Scott, 13 Ind. 225, 230.

14 Jones, 19 Iowa, 236, 242; Howland, 20 Hun, 472, 473.

15 Tunks v. Grover, 57 Me. 586, 588.

16 Berdell v. Parkhurst, 19 Hun, 355, 360.

§ 55. Suits between husband and wife after dissolution of marriage. — Death<sup>1</sup> or absolute divorce<sup>2</sup> completely dissolves the unity of husband and wife, and removes the disabilities of married women, so that after death or divorce there is no incapacity for husband and wife to sue each other.<sup>3</sup> But dissolution of marriage affects only the remedy; it does not revive or give any substantial right.<sup>4</sup> Thus a note from a man to a woman, if extinguished by their subsequent marriage,<sup>5</sup> cannot be sued on after his death;<sup>6</sup> but if held by her as her separate property,<sup>7</sup> or in a representative capacity,<sup>8</sup> though during coverture she could not sue on it at all, or only in equity,<sup>9</sup> after his death she may enforce it against his representatives at law,<sup>10</sup> or after her death her representatives may so enforce it against him.<sup>11</sup> So, as husband and wife cannot be liable to each other in tort,<sup>12</sup> they cannot, even after divorce, sue each other for a wrong committed during coverture;<sup>13</sup> but on valid contracts between them they can sue each other at law after divorce.<sup>14</sup>

1 Stewart M. & D. §§ 452, 463.

2 Stewart M. & D. §§ 427, 433, 442, 448, 449.



3 See *Phillips v. Barnet*, 1 Q. B. Div. 436, 433, 440; *King v. Green*, 2 Stewt. 133, 135; *Davidson v. Smith*, 20 Iowa, 466, 468; *Mitchell*, 4 Mon. B. 380, 381; *Abbott*, 67 Me. 304, 306; 24 Am. Rep. 27; *Blake*, 64 Me. 177, 180, 182; *Carleton*, 72 Me. 115, 116; 39 Am. Rep. 307; *Barton*, 32 Md. 214, 224; *Abbott v. Winchester*, 105 Mass. 115.

4 *Abbott*, 67 Me. 301, 306, 300; 21 Am. Rep. 27; *infra*, n. 3.

5 *Ante*, § 44.

6 *Abbott v. Winchester*, 105 Mass. 115.

7 *Barton*, 32 Md. 214, 224; *ante*, § 44.

8 *King v. Green*, 2 Stewt. 133, 135; 19 Am. Dec. 46; *ante*, §§ 41, 44.

9 *Ante*, § 54.

10 *Barton*, 32 Md. 214, 224.

11 *Mitchell*, 4 Mon. B. 380, 381.

12 *Ante*, §§ 46, 47.

13 *Phillips v. Barnet*, 1 Q. B. Div. 436, 439; *Abbott*, 67 Me. 304, 306, 300.

14 *Blake*, 64 Me. 177, 182; *Carleton*, 72 Me. 115, 116; 39 Am. Rep. 309.

### § 55 a. Defenses in suits between husband and wife.<sup>1</sup>—

The Statute of Limitations does not run between husband and wife during coverture,<sup>2</sup> although there is a remedy in equity,<sup>3</sup> but if they can sue each other at law it does.<sup>4</sup> Set-off may be pleaded in a suit between them.<sup>5</sup>

1 See *post*, SUITS OF MARRIED WOMEN.

2 *Lahr*, 90 Pa. St. 507, 510.

3 *Bowie v. Stonestreet*, 6 Md. 418, 431.

4 Consult *post*, LIMITATIONS.

5 *Greer*, 24 Kan. 101, 107.

§ 56. Testimony of husband and wife for and against each other.—1. With certain exceptions named below, a husband and wife could not at common law testify the one for or against the other,<sup>1</sup> in any legal proceeding in which the other was a party,<sup>2</sup> or which involved the other's pecuniary interests,<sup>3</sup> or criminal responsibility.<sup>4</sup> This was because (1) husband and wife are one,<sup>5</sup> and as no one could testify for or against himself,<sup>6</sup> neither could his wife testify for or against him;<sup>7</sup> (2) to allow one to testify for the other would be to put him or her under a great temptation to commit perjury;<sup>8</sup> and (3)

H. & W. — 7.

to allow one to testify against the other would be to endanger the harmony and confidence of the marriage relation.<sup>9</sup> This rule applies equally to husband and to wife,<sup>10</sup> but somewhat differently to criminal and civil cases.<sup>11</sup> It is a rule involving questions of public policy, and cannot be waived by consent of parties.<sup>12</sup> It applies just as soon as the parties are husband and wife, though their marriage takes place after one of them is summoned to testify;<sup>13</sup> but it does not apply after dissolution of the marriage by death,<sup>14</sup> or absolute divorce,<sup>15</sup> except as to facts learned as husband or wife—confidential communications.<sup>16</sup> Nor does it apply to cases where no valid marriage exists.<sup>17</sup> Various questions arise as to the capacity of husband or wife to prove their marriage,<sup>18</sup> or to testify in nullity,<sup>19</sup> or divorce<sup>20</sup> suits. To illustrate: In an action by a woman as a *femme sole* her husband cannot defeat the action by proof of their marriage;<sup>21</sup> a wife cannot testify in a bankruptcy proceeding against her husband;<sup>22</sup> or in a prosecution against him and others for conspiracy even for the others;<sup>23</sup> when one cannot testify the other cannot;<sup>24</sup> when one can, the other can.<sup>25</sup> (Statutes have so far superseded the common law that a minute discussion of the latter is omitted.)

2. *Exceptions.* At common law a husband and wife could testify, the one for or against the other, in prosecutions of the one for criminal injury to the other,<sup>26</sup> as for assault and battery,<sup>27</sup> rape,<sup>28</sup> shooting,<sup>29</sup> forcible abduction.<sup>30</sup> So, dying declarations of one who has been murdered are evidence against the other in a trial for such murder.<sup>31</sup> So the wife's affidavit is evidence when she exhibits articles of the peace against her husband.<sup>32</sup> Declarations of one while acting as agent for the other are admissible.<sup>33</sup> So in trials for treason the one was at one time compellable to testify against the

other.<sup>34</sup> The rule is not applicable to testimony in wholly collateral proceedings.<sup>35</sup>

3. *Statutes.* The incapacity of husband and wife to testify for or against each other does not depend on interest alone,<sup>36</sup> but on the relation of husband and wife, the unity and harmony of which it was thought would be otherwise jeopardized.<sup>37</sup> A statute enabling "all persons" to testify would be construed not to affect the marriage relation,<sup>38</sup> and statutes abolishing all incapacity from interest do not change the rule as to testimony between husband and wife.<sup>39</sup> This rule must be expressly changed;<sup>40</sup> a statute enabling the parties *litigant* in any suit, and their *husbands* and *wives* to testify, does not change the common-law rule as to testimony in criminal cases.<sup>41</sup> But when parties to suits are enabled to testify, and husband and wife are joint parties, he may testify as to his interest, and she as to hers.<sup>42</sup> When a statute provides that all parties may testify except that husband and wife cannot in certain cases, they can in other cases.<sup>43</sup> Many other questions have arisen under the statutes in the various States.<sup>44</sup>

1 1 Greenl. Ev. §§ 334, *et seq.*; 2 Stark Ev. pp. 706, *et seq.*; 1 Best Ev. §§ 175, *et seq.*; 2 Taylor Ev. §§ 1227, *et seq.*; 1 Blackst. Com. 443; 2 Kent Com. 179, 180; 1 Hale P. C. 301; Rex v. Cliviger, 2 Term, 263; Rex v. Locker, 5 Esp. 107; Stein v. Bowman, 13 Peters, 209, 220-223; Bank v. Mandeville, 1 Cranch C. C. 575; Gilleland v. Martin, 3 McLean, 490; Wilson v. Sheppard, 23 Ala. 623; Pryor v. Ryburn, 16 Ark. 671; Dawley v. Ayers, 23 Cal. 193; Merriam v. Hartford, 20 Conn. 354; 52 Am. Dec. 344; Kemp v. Dowham, 5 Har. (Del.) 417; Keaton v. McGivier, 24 Ga. 217; Waddams v. Humphrey, 22 Ill. 661; Kyle v. Frost, 29 Ind. 338; Karney v. Paisley, 13 Iowa, 89; Higdon, 6 Marsh. J. J. 48; 22 Am. Dec. 84; Smead v. Williamson, 16 Mon. B. 42; Tulley v. Alexander, 11 La. An. 623; Dwelly, 46 Me. 377; Bradford v. Williams, 2 Md. Ch. 1; Griffin v. Brown, 2 Pick. 304; State v. Armstrong, 4 Minn. 325; Moore v. McKie, 13 Miss. 238; Tomlinson v. Lynch, 32 Mo. 169; Craig v. Kittredge, 20 N. H. 169; Kelley v. Proctor, 41 N. H. 139; Den v. Johnson, 18 N. J. L. 87; White v. Stafford, 33 Barb. 419; Rice v. Keith, 63 N. C. 319; Bird v. Hueston, 10 Ohio St. 418; Gross v. Reddy, 45 Pa. St. 406; Donnelly v. Smith, 7 R. I. 12; Footman v. Pendergrass, 2 Strob. Eq. 317; Kimbrough v. Mitchell, 1 Head, 539; Gee v. Scott, 43 Tex. 510, 513; 26 Am. Rep. 331; Cameron v. Fay, 55 Tex. 58; Barny v. Reed, 1 Hen. & M. 154; Manchester, 24 Vt. 649; Farrell v. Ladwell, 21 Wis. 182; Zane v. Fink, 18 W. Va. 693.

2 See Bentley v. Cook, 2 Term, 265, 269; Higdon, 6 Marsh. J. J. 48; 22 Am. Dec. 84; Bird v. Davis, 14 N. J. Eq. 467.

3 See *Labaree v. Wood*, 54 Vt. 452, 453, 454; *Cobb v. Edmondson*, 30 Ga. 30; *Pyle v. Maulding*, 7 Marsh. J. J. 202

4 *Commonw. v. Easland*, 1 Mass. 15; *Den v. Johnson*, 13 N. J. L. 87, 99, 190.

5 *Wyndham v. Chetwynde*, 1 Burr. 424; *Coke Litt.* 6 *b*; *ante*, § 38.

6 1 *Greenl. Ev.* § 329; 1 *Best Ev.* § 168, note cases and statutes collected.

7 *Turner v. State*, 50 Miss. 351, 354; *infra*, n. 9; *supra*, n. 1.

8 *Davis v. Dinwoody*, 4 Term, 673, 679; *infra*, n. 9.

9 *Alcock*, 12 Eng. L. & Eq. 354, 355; *Stapleton v. Crofts*, 18 Ad. & E. N. S. 367, 369; *Lucas v. Brooks*, 18 Wall. 436, 452; *Mitchinson v. Cross*, 53 Ill. 366, 369; *Blake v. Graves*, 18 Iowa, 312, 317; *Tully v. Alexander*, 11 La. An. 623; *Develly*, 46 Me. 377, 379; *McKeen v. Frost*, 46 Me. 239, 243, 250; *Bradford v. Williams*, 2 Md. Ch. 1, 2; *Kelly v. Drew*, 12 Allen, 107, 109; *Dunlap v. Hearn*, 37 Miss. 471, 474; *Turner v. State*, 50 Miss. 351, 354; *Young v. Gilman*, 46 N. H. 484, 483; *Den v. Johnson*, 13 N. J. L. 87, 98; *Marsh v. Potter*, 30 Barb. 505, 509; *Gibson v. Commonw.* 87 Pa. St. 253, 256; *State v. Workman*, 15 S. C. 540, 543; *Gee v. Scott*, 43 Tex. 510, 514, 515; 26 Am. Rep. 331; *Cram*, 33 Vt. 15, 20; *Manchester*, 24 Vt. 649, 650.

10 *Rex v. Sergeant*, 1 Ryan & M. 352, 354.

11 See *Turpin v. State*, 55 Md. 462, 475-477.

12 *Stein v. Bowman*, 13 Peters, 203, 223; *Turner v. State*, 50 Miss. 351, 354; *Randall*, 5 City Hall Rec. 111, 153, 154; 1 *Greenl. Ev.* § 340. As to statute, see *Jordan v. Henderson*, 19 Iowa, 235.

13 *Pedley v. Wellesley*, 3 Car. & P. 553, 559.

14 *Stewart M. & D.* § 470.

15 *Stewart M. & D.* § 429.

16 *Stein v. Bowman*, 13 Peters, 203, 223; *Ames*, 33 La. An. 1317, 1327; *State v. Jolly*, 3 Dev. & B. Eq. 110, 112; *Stewart M. & D.* §§ 439, 470.

17 *Stewart M. & D.* §§ 65, n. 14, 123, 343.

18 *Stewart M. & D.* §§ 123, 243, 351.

19 *Stewart M. & D.* §§ 65, 123.

20 *Stewart M. & D.* § 343.

21 *Bentley v. Cooke*, 3 Doug. 422; cited 2 Term, 235, 269.

22 *James*, 1 P. Wms. 610, 611.

23 *State v. Workman*, 15 S. C. 543, 543. As to civil suits, see *Mercer v. Patterson*, 41 Ind. 440; *Stewart*, 41 Wis. 621.

24 *Berry v. Stevens*, 69 Me. 290, 293.

25 *Duffin v. State*, 11 Tex. App. 76, 79.

26 *Bentley v. Cooke*, 3 Doug. 422; *Wakefield*, 2 Lew. C. C. 237; *Stein v. Bowman*, 13 Peters, 203, 221; *State v. Neil*, 6 Ala. 685; *Goodwin v. State*, 60 Ga. 500; *State v. Bennett*, 31 Iowa, 24; *State v. Dyer*, 59 Me. 303; *Turner v. State*, 50 Miss. 351, 354; *People v. Chegaray*, 13 Wend. 642; *State v. Parrott*, 79 N. C. 615; *Whipp v. State*, 34 Ohio St. 87, 89, 91; 32 Am. Rep. 359.

27 *Whipp v. State*, 34 Ohio St. 87, 89, 91; 32 Am. Rep. 359.

28 *Audley*, 3 How. St. Tr. 402, 413; *Hut.* 115, 116.

29 *Whitehouse*, cited 2 Russ. Crimes, 606.

30 1 *East's P. C.* 454; 1 *Greenl. Ev.* § 343.

31 *Rex v. Woodcock*, 2 Leach, 563; *Stoop*, Addis. 381; *People v. Green*, 1 Denio, 614; *State v. Belcher*, 13 S. C. 453.

32 *Rex v. Doherty*, 13 East, 171; *Rex v. Mead*, 1 Burr 542; *Rex v. Ferrers*, 1 Burr. 635; *Lawley*, Bull N. P. 237.

33 See *Robertson v. Brost*, 83 Ill. 116; *Smied v. Frank*, 86 Ind. 250, 257; *Bradford v. Williams*, 2 Md. Ch. 1, 3; *Chesley*, 54 Mo. 347; *Thomas v. Hargrave*, *Wright*, 595, 526; *Gibson*, 16 Vt. 451; *Town v. Lamphire*, 37 Vt. 52, 57; *Lunay v. Vantyne*, 40 Vt. 501, 503; *Birdsall v. Dunn*, 16 Wis. 235, 241; *Arndt v. Harshaw*, 53 Wis. 269. But see *Watkins v. Turner*, 34 Ark. 663; *Roblson*, 44 Ala. 227.

34 1 Greenl. Ev. § 345.

35 *Rex v. Bathwick*, 2 Barn. & Ad. 639, 647. See *Lincoln v. Madans*, 102 Ill. 417, 420; *Griffin v. Brown*, 2 Pick. 303; *Fitch v. Hill*, 11 Mass. 286; *Den v. Johnson*, 18 N. J. Eq. 87, 99; *Baring v. Reeder*, 1 Hen. & M. 154, 168; 1 Greenl. Ev. § 342.

26 *Gee v. Scott*, 48 Tex. 510, 514, 515; 26 Am. Rep. 331; *supra*, n. 9; *infra*, n. 39.

37 *Lucas v. Brooks*, 13 Wall. 425, 452; *supra*, n. 9; *infra*, n. 29.

38 *Ante*, § 12; *infra*, n. 39; consult, *ante*, §§ 11-18, CONSTRUCTION.

39 *Stapleton v. Crofts*, 18 Ad. & E. N. S. 367, 369; *Alcock*, 12 Eng. L. & Eq. 354, 355; *Lucas v. Brooks*, 13 Wall. 425, 452; *Jones*, 6 Diss. 63, 61; *Sumner v. Cook*, 51 Ala. 521; *Lincoln v. Madans*, 102 Ill. 417, 421; *Mitchinson v. Goss*, 58 Ill. 366, 369; *Russ v. Steamboat*, 14 Iowa, 263, 374; *McKeen v. Frost*, 46 Me. 223, 243, 250; *Dwelly*, 46 Me. 377, 380; *Turpin v. State*, 55 Md. 462, 477; *Peaslee v. McLoon*, 16 Gray, 483, 489; *Kelly v. Drew*, 12 Allen, 107, 109; *Anon.* 58 Miss. 15, 18; *Byrd v. State*, 57 Miss. 243; 34 Am. Rep. 440; *Dunlap v. Hearn*, 37 Miss. 471, 474; *Young v. Gilman*, 46 N. H. 484, 486; *Corson*, 44 N. H. 587, 593; *Longendyke*, 4 Barb. 365, 368; *Schultz v. State*, 32 Ohio St. 276, 280; *Gibson v. Commonw.* 87 Pa. St. 233, 256; *State v. Workman*, 15 S. C. 540, 543; *Stafford*, 41 Tex. 111, 113; *Gee v. Scott*, 48 Tex. 510, 514; 26 Am. Rep. 331; *Crane*, 33 Vt. 15, 29; *Manchester*, 24 Vt. 619, 623. But see *Merriam v. Hartford*, 20 Conn. 354, 363; *Berlin*, 52 Mo. 151, 153.

40 See *Turpin v. State*, 55 Md. 462, 477; *Pillow v. Bushnell*, 5 Barb. 156, 157; *supra*, n. 33.

41 *Turpin v. State*, 55 Md. 462, 477, 473; *Wilke v. People*, 53 N. Y. 525; *Steen v. State*, 20 Ohio St. 333.

42 See *Klink v. Noble*, 37 Ark. 233, 302; *Hawver*, 78 Ill. 412; *Clouse v. Elliott*, 71 Ind. 302; *Mousler v. Harding*, 33 Ind. 176; 5 Am. Rep. 135; *Lockwood v. Joab*, 27 Ind. 423, 424; *Albaugh v. James*, 29 Ind. 373, 399; *Marsh v. Potter*, 30 Barb. 563, 569; *Pillow v. Bushnell*, 5 Barb. 153, 157; *Duval v. Davey*, 32 Ohio St. 694; *Kalme v. Ormo*, 49 Wis. 371.

43 See *Minier*, 4 Lans. 421, 425.

44 See *Robinson*, 44 Ala. 227; *Steinburg v. Meaney*, 53 Cal. 425; *Porter v. Allen*, 54 Ga. 623; *Hayes v. Pamalce*, 79 Ill. 563; *Reeves v. Herr*, 59 Ill. 81; *Stanton*, 36 Ind. 445; *Bunker v. Bennett*, 103 Mass. 516; *Haerie v. Kreihn*, 65 Mo. 202; *Parsons v. People*, 21 Mich. 503; *People v. Reagle*, 60 Barb. 527; *Wilke v. People*, 53 N. Y. 525; *State v. Brown*, 67 N. C. 470; *Steen v. State*, 20 Ohio St. 333; *Musser v. Gardner*, 66 Pa. St. 242; *Craig v. Brendel*, 69 Pa. St. 153; *Ballentine v. White*, 77 Pa. St. 20; *Overton v. State*, 43 Tex. 616; *Carpenter v. Moore*, 43 Vt. 392; *White v. Perry*, 14 W. Va. 63; *Menk v. Steinfort*, 39 Wis. 270.

## CHAPTER IV.

### CONJUGAL RIGHTS AND OBLIGATIONS.

ART I. THE SEVERAL CONJUGAL RIGHTS AND OBLIGATIONS, §§ 57-71.

II. ACTIONS ARISING FROM CONJUGAL RIGHTS AND OBLIGATIONS, §§ 72-81.

ART. I.—THE SEVERAL CONJUGAL RIGHTS AND OBLIGATIONS.

- § 57. Conjugal rights and obligations defined.
- § 58. Right of love, honor, etc.
- § 59. Right of matrimonial cohabitation and intercourse.
- § 60. Right to fix family home, and regulate household.
- § 61. Right to use family name.
- § 62. Right of personal custody and restraint
- § 63. Right of personal chastisement.
- § 64. Right of support.
- § 65. Right to personal services.
- § 66. Liability in tort.
- § 67. Liability in contract.
- § 68. Liability in crime.
- § 69. Other personal rights and liabilities.
- § 70. Property rights and liabilities.
- § 71. Rights and obligations as to children.

§ 57. **Conjugal rights and obligations defined.**—Conjugal rights and obligations are those which attach to one *as husband* or *as wife*.<sup>1</sup> They include not only the rights and obligations of husband and wife toward each other—such as the right of cohabitation<sup>2</sup> and the obligation to support;<sup>3</sup> but also their rights and obligations toward third parties—such as the husband's right to recover for injuries to his wife<sup>4</sup> and his obligation to make good damage done by her.<sup>5</sup> A discussion of conjugal rights and obligations therefore includes (1) husband and wife's mutual rights and obligations of

affection, cohabitation, and support; the husband's right to fix the place of residence, and his right to restrain and chastise his wife; the wife's right to use her husband's name; their other rights over each other's persons and their respective rights in each other's property; the rights and obligations of the one arising out of the torts, crimes, or contracts of the other.<sup>6</sup> (2) Actions which may arise between the husband and wife or with third parties out of conjugal rights and obligations.<sup>7</sup>

1 This definition seems broader perhaps than usage sanctions, but it is adopted for convenience.

2 *Post*, § 59.

3 *Post*, §§ 64, 65.

4 *Post*, § 77.

5 *Post*, § 66.

6 *Post*, §§ 53-71.

7 *Post*, §§ 72-81.

§ 53. **Conjugal right of love, honor, etc.**—A marriage is valid, though entered into by parties who care nothing for each other,<sup>1</sup> and after their marriage the law does not deal with the mutual feelings of husband and wife, except so far as these manifest themselves in conduct, and then only if the conduct takes the form of cruelty, desertion,<sup>3</sup> or some other cause for divorce.<sup>4</sup> Therefore when a court says a wife is "bound to love, honor, and obey her husband,"<sup>5</sup> it is speaking sentimentally.<sup>6</sup> In one case, however, loving treatment seems to be a legal right: a spouse who has been forgiven a marriage offense must treat his wife or her husband with "conjugal kindness," or the offense will be revived.<sup>7</sup> And alienation of affection is one of the grounds of damage in a suit for criminal conversation.<sup>8</sup>

1 *Stewart M. & D.* § 46.

2 *Stewart M. & D.* §§ 261-273.

3 *Stewart M. & D.* §§ 243-250.

4 *Stewart M. & D.* §§ 173, 231.



5 *Martin v. Robson*, 65 Ill. 129, 133. See Cal. Civ. Code, § 155.

6 See 1 Bish. M. W. § 459.

7 *Durant*, 1 Hagg. Ecc. 733; 3 Eng. Ecc. 310, 329, 335; *Stewart M. & D.* § 309.

8 *Yundt v. Hartranft*, 41 Ill. 9, 17; *post*, § 79.

§ 59. **Conjugal right to cohabitation and intercourse.**—The legal conditions under which man and woman may lawfully cohabit and have legitimate children constitute marriage.<sup>1</sup> The law not only presumes that husband and wife have a common home,<sup>2</sup> but, often, that a man and woman who have a common home are husband and wife.<sup>3</sup> If husband and wife do live apart their status or legal condition is abnormal.<sup>4</sup>

1. Cohabitation is in fact a conjugal right;<sup>5</sup> the husband has a right to the wife's,<sup>6</sup> and the wife to the husband's, company;<sup>7</sup> a husband's agreement to pay his wife for living with him is without consideration;<sup>8</sup> and each has a right to enter the family residence,<sup>9</sup> whichever owns it.<sup>10</sup> It is not a right, however, which in the United States can be specifically enforced;<sup>11</sup> but if it is intentionally infringed for a specified time it is generally, by statute as desertion, a cause for divorce,<sup>12</sup> and so if it is broken up by imprisonment, this is in some States a cause for divorce;<sup>13</sup> so if the wife wrongfully leaves her husband she forfeits her right to support,<sup>14</sup> as by deserting her he forfeits his right to her services;<sup>15</sup> so if the husband renounces cohabitation altogether by leaving the State for good, the wife becomes to some extent a *femme sole*.<sup>16</sup> If a third party interferes with this right by separating one spouse from the other, the wronged spouse may sue such party for damages.<sup>17</sup> This right may be waived by consent,<sup>18</sup> as in a deed of separation;<sup>19</sup> it is forfeited by conduct entitling the other party to a divorce,<sup>20</sup> and perhaps, by other outrageous and indecent conduct;<sup>21</sup> and it is suspended during divorce proceedings.<sup>22</sup>



2. Matrimonial cohabitation involves sexual intercourse, since the production of children is presumably contemplated by those who marry;<sup>23</sup> and from such cohabitation sexual intercourse is implied.<sup>24</sup> So sexual intercourse is a conjugal right.<sup>25</sup> If owing to some physical or psychic defect in one of the parties to a marriage the enjoyment of this right is permanently impossible, the marriage may be avoided.<sup>26</sup> But the mere denial of this right does not work a forfeiture of any other conjugal right,<sup>27</sup> and is not cruelty<sup>28</sup> or desertion,<sup>29</sup> though it may be an indignity,<sup>30</sup> and accompanying an offer to resume cohabitation, may render such an offer of no effect;<sup>31</sup> nor does it justify separation.<sup>32</sup> The excessive indulgence in this right by one party to the injury of the other's health,<sup>33</sup> or the insisting upon it when the other is delicate, weak, or ill,<sup>34</sup> or by one who has a venereal disease,<sup>35</sup> is cruelty, and justifies separation,<sup>36</sup> or a suit for divorce.<sup>37</sup> This right is waived or forfeited with the right of a cohabitation.<sup>39</sup> Not only have husband and wife thus, the right of mutual intercourse, but each has the right that the other shall indulge in such intercourse with no one else, and in case of such indulgence the wronged party may obtain a divorce for adultery;<sup>39</sup> or sue the third party for criminal conversation,<sup>40</sup> or if he catches such third party in the act kill him and be guilty only of manslaughter.<sup>41</sup>

1 Stewart M. & D. §§ 1, 17.

2 Firebrace, Law R. 4 P. & D. 63, 67; Hanberry, 29 Ala. 719, 724; Davis, 30 Ill. 180; Sanderson v. Ralston, 20 La. An. 312, 315, 320; Greene, 11 Pick. 410, 415; Hackettstown v. Mitchell, 28 N. J. L. 516, 518; Wilborns v. Saunders, 5 Cold. 60, 79; Stewart M. & D. §§ 221, 253; *post*, § 60.

3 Commonw. v. Hurlev, 14 Gray, 411, 412; Badger, 88 N. Y. 546. As to proof of marriage by cohabitation: See Stewart M. & D. §§ 132, 135, 136.

4 English, 27 N. J. Eq. 579, 581; Stewart M. & D. § 173.

5 Anon. Deane & S. 295, 298, 300; Price, 2 Fost. & F. 263, 264; Barnes v. Allen, 30 Barb. 663, 663; Westlake, 34 Ohio St. 621, 623; 32

Am. Rep. 397; *Ximines v. Smith*, 39 Tex. 49, 52; *Stewart M. & D.* § 175.

6 *Ximines v. Smith*, 39 Tex. 49, 52; *post*, § 78.

7 *Clark v. Harlan*, 1 Cin. Rep. 418, 422; *post*, § 78.

8 *Robert v. Frisby*, 38 Tex. 219, 220.

9 See *Rex v. Gould*, 2 East P. C. 644; Cal. Civ. Code, § 157; *Commonw. v. Hartnett*, 3 Gray, 450, 452; *Snyder v. People*, 26 Mich. 106, 108, 110; 12 Am. Rep. 30.

10 See *Walker v. Reamy*, 36 Pa. St. 410, 414, 416.

11 *Baugh*, 37 Mich. 53, 62; *Stewart M. & D.* § 175.

12 See "Desertion" discussed in *Stewart M. & D.* §§ 178, 249, 260.

13 *Handy*, 124 Mass. 394, 395. See Revised Laws of Ala., Ark., Cal., Colo., Conn., Del., Ga., Ill., Ind., Iowa, Kan., Ky., La., Mass., Mich., Minn., Miss., Mo., Neb., Nev., N. H., Ohio, Oreg., Pa., Tenn., Tex., Va., Vt., Wash., W. Va., Wis., cited *Stewart M. & D.* § 288.

14 *Schindel*, 12 Md. 294, 314; *post*, § 64.

15 *Reese v. Waters*, 9 Watts, 90, 94; *post*, § 65.

16 *Gregory v. Pierce*, 4 Met. 478, 479, cases collected; *Stewart M. & D.* § 177.

17 *Barnes v. Allen*, 30 Barb. 663, 668; *Westlake*, 34 Ohio St. 621, 628; 32 Am. Rep. 397; *post*, § 78.

18 *Gray*, 15 Ala. 779, 784, 785; *Benkert*, 32 Cal. 467, 470; *Cox*, 35 Mich. 461, 463; *Stewart M. & D.* § 256.

19 *Walker*, 9 Wall. 743, 750, cases cited; *Stewart M. & D.* §§ 182-191.

20 *Grove*, 37 Pa. St. 413, 417; *Stewart M. & D.* §§ 175, 257.

21 See *Lyster*, 111 Mass. 327; *Cornish*, 23 N. J., Eq. 208, 209; *Stewart M. & D.* § 287.

22 *Burns*, 60 Ind. 259, 260; *Harper*, 29 Mo. 301, 303; *Stewart M. & D.* §§ 308, 311, 384, 410. Of course divorce destroys it; *Stewart M. & D.* § 435.

23 Discussed in *Stewart M. & D.* §§ 1, 17, 63, 103, 104, 173.

24 *Burns*, 60 Ind. 259, 260; *Harper*, 29 Mo. 301, 303; *Stewart M. & D.* §§ 308, 311, 384, 410.

25 See *Orme*, 2 Add. Ec. R. 382; 2 Eng. Ecc. 354, 356; *Forster*, 1 Hagg. Const. 144, 154; 4 Eng. Ecc. 363, 364; *D'Aguilar*, 1 Hagg. Ecc. 776; *Shaw*, 17 Conn. 189, 196; *Steele*, 1 MeAr. 605, 606; *Gibbs*, 18 Kan. 419, 422, 424; *Fishli*, 2 Litt. 338, 341; *Southwicks*, 97 Mass. 327, 328, 329; *Cowles*, 112 Mass. 298; *Canfield*, 34 Mich. 579; *Melvin*, 58 N. H. 569, 571; *Cook*, 32 N. J. Eq. 475, 479; *English*, 27 N. J. Eq. 71, 74, 579; *Reid*, 21 N. J. Eq. 331, 332, 333; *Coble*, 2 Jones Eq. 392, 394; *Gordon*, 48 Pa. St. 226, 228; *Eshbach*, 23 Pa. St. 343, 345; *Magill*, 3 Pittsb. Rep. 25.

26 "Impotence" discussed, *Stewart M. & D.* §§ 61, 67.

27 *Potter v. Barclay*, 15 Ala. 437, 439; *Cowles*, 112 Mass. 298; *Gordon*, 48 Pa. St. 226, 228. *Contra*, Cal. Civ. Code, § 96.

28 *Cowles*, 112 Mass. 298; *Eshbach*, 22 Pa. St. 843, 845; *Stewart M. & D.* § 269. *Contra*, Cal. Civ. Code, § 96.

29 *Southwick*, 97 Mass. 327, 329; *Stewart M. & D.* § 252.

30 *Coble*, 2 Jones Eq. 392, 395; *Stewart M. & D.* § 282.

31 *Fishli*, 2 Litt. 338, 341.

32 *Reid*, 21 N. J. Eq. 331, 333; *Eshbach*, 23 Pa. St. 343, 345.

33 Melvin, 58 N. H. 569, 571.

34 Shaw, 17 Conn. 189, 196; English, 29 N. J. Eq. 71, 74, 79.

35 N. 3 Swab. & T. 234, 239; Canfield, 14 Mich. 519; Holthoeffer, 47 Mich. 259, 260; Cook, 32 N. J. Eq. 475, 477; Long, 2 Hawks, 189, 192; Stewart M. & D. § 259.

36 Hesler, Wright, 210, 211; Stewart M. & D. § 259.

37 "Cruelty" as a cause for divorce discussed: Stewart M. & D. §§ 261, 273.

38 *Supra*, notes 18-22.

39 "Adultery" as a cause for divorce discussed: Stewart M. & D. §§ 241-248.

40 Yundt v. Hartranft, 41 Ill. 9, 10.

41 Rex v. Kelly, Car. & K. 814; State v. Holme, 54 Mo. 153, 166; Shuffin v. People, 62 N. Y. 229, 235; 20 Am. Rep. 483; State v. Harman, 79 N. C. 515, 518; State v. Neville, 6 Jones, 433; Desty Crim. L. § 128, n. 1; 2 Bish. Crim. L. § 638.

§ 60. **Conjugal right to fix the family home and regulate the household.**—The wife by marriage is merged in the husband;<sup>1</sup> the husband is the "head of the wife";<sup>2</sup> she is *sub protestate viri*;<sup>3</sup> he may to some degree restrain<sup>4</sup> or punish<sup>5</sup> her, so much is she under his control, that by the common law any wrong done by her in his presence is considered as his sole deed,<sup>6</sup> and under early enabling acts she was required to acknowledge her conveyances out of his presence.<sup>7</sup> So the husband's rights over the children are paramount.<sup>8</sup> He is thus the head of the family.<sup>9</sup> He decides where the family residence shall be,<sup>10</sup> and may change it as often as his pleasure, health, or business dictates;<sup>11</sup> and his wife must live where he directs,<sup>12</sup> as long as he acts in good faith,<sup>13</sup> in spite of an antenuptial agreement to the contrary;<sup>14</sup> but she has a right to live with him,<sup>15</sup> and he cannot banish her to a lonely place for punishment;<sup>16</sup> nor can he thus endanger her health;<sup>17</sup> nor perhaps can he remove her from her native land,<sup>18</sup> or make her live with his relations.<sup>19</sup> As a result a husband's domicile is usually the place where he has established his family,<sup>20</sup> although during his absence his wife has moved;<sup>21</sup> and the wife's domicile, except

in certain cases where she has a separate domicile for divorce,<sup>22</sup> is that of her husband.<sup>23</sup> So the husband may decide who shall visit the family residence,<sup>25</sup> and may prevent its being used for purposes of prostitution<sup>25</sup> or illegal liquor selling,<sup>26</sup> although it belongs to the wife;<sup>27</sup> for statutes relating to married women do not remove the husband from his place as head of the family.<sup>28</sup> When the husband is insane the wife is head of the family<sup>29</sup> so she is when he is absent.<sup>30</sup>

1 *Ante*, ‡ 33.

2 *Todd*, 15 Ala. 743, 744; *Boozar v. Addison*, 2 Rich. Eq. 273, 275.

3 *Allen v. Hooper*, 50 Me. 371, 372; *Burdene v. Amperse*, 14 Mich. 90, 95.

4 *Price*, 2 *Fost. & F.* 263, 264; *post*, ‡ 62.

5 *Richards*, 1 *Grant*, 339, 332; *post*, ‡ 63.

6 *Cassin v. Delany*, 38 N. Y. 173, 179; *post*, ‡ 66.

7 *White v. Wager*, 25 N. Y. 323, 330. And even under later acts his undue influence may be easily proved: *Whiteridge v. Barry*, 42 Md. 140, 153; *Witbeck*, 25 Mich. 439.

8 *Stewart M. & D.* ‡ 400; *post*.

9 *Elijah v. Taylor*, 57 Ill. 247, 249; *Commonw. v. Wood*, 57 Mass. 225, 229; *Glover v. Alcott*, 11 Mich. 471, 485; *Commonw. v. Barry*, 2 *Green. Cr. Rep.* 285, 287. See *Cal. Civ. Code*, ‡ 156; *Ga. Code*, 1873, ‡ 1753.

10 *Firebrace*, *Law R.* 4 *Pro. & D.* 63, 67; *Hanbery*, 29 Ala. 719, 724; *Hardenbergh*, 14 Cal. 654, 655, 657; *Kennedy*, 87 Ill. 230, 232; *Cutler*, 2 *Brewst.* 511, 513. Cases collected, *Stewart M. & D.* §§ 221, 253.

11 *Cutler*, 2 *Brewst.* 511, 513.

12 *Cochrane*, 8 *Dowl. P. C.* 630, 636; *Price*, 2 *Fost. & F.* 263, 264; *Babbitt*, 65 Ill. 277, 279; *supra*, n. 10.

13 *Hardenbergh*, 14 Cal. 654, 656; *Boyce*, 23 N. J. Eq. 337, 343; *Bishop*, 30 Pa. St. 412, 415; *Cutler*, 2 *Brewst.* 511, 513; *Powell*, 29 Vt. 143, 150; *Gleason*, 4 Wis. 64, 65.

14 *Idr.*, 10 Rich. Eq. 163, 175.

15 *Clark v. Harlan*, 1 *Ch. Rep.* 413, 422; *ante*, ‡ 59.

16 *Boyce*, 23 N. J. Eq. 337, 343.

17 *Cutler*, 2 *Brewst.* 511, 513; *Powell*, 29 Vt. 143, 150; *Gleason*, 4 Wis. 64, 66. For this would be cruelty: *Stewart M. & D.* §§ 231-273.

18 *Bishop*, 30 Pa. St. 412, 415.

19 *Powell*, 29 Vt. 143, 150.

20 *Platt v. New*, *Law R.* 3 App. 336, 343. See *Stewart M. & D.* ‡ 222; *ante*, ‡ 29.

21 *Porterfield v. Augusta*, 67 Me. 556, 557.

22 *Stewart M. & D.* ‡ 221.

23 *Barber*, 21 How. 582, 594; *Stewart M. & D.* ‡ 221; *ante*, ‡ 23.

24 *Fulton*, 36 Miss. 517, 528.

25 *Commonw. v. Wood*, 97 Mass. 225, 229.

26 *Commonw. v. Barry*, 2 Green Cr. Rep. 285, 287; 115 Mass. 146.

27 *Commonw. v. Pratt*, 126 Mass. 462, 463; *Commonw. v. Wood*, 97 Mass. 225, 229; *Commonw. v. Barry*, 2 Green Cr. Rep. 285, 287; 115 Mass. 146.

28 *Glover v. Alcott*, 11 Mich. 471, 485; *supra*, n. 27.

29 *Robinson v. Frost*, 54 Vt. 105, 111; 41 Am. Rep. 835.

30 *Sawyer v. Cutting*, 23 Vt. 486, 491; *Felker v. Emerson*, 16 Vt. 653, 655; *post*, § 90.

§ 61. **Conjugal right to use family name.**—The husband being head of the family,<sup>1</sup> the wife and children generally adopt his family name—by custom the wife is called by her husband's name.<sup>2</sup> But whether she shall take his name or keep hers, or he take hers, is after all a mere question of choice as any one may adopt any name he or she pleases.<sup>3</sup>

1 *Ante*, § 60.

2 *Converse*, 9 Rich. Eq. 535, 570. See *Fendall v. Goldsmith*, Law R. 2 P. D. 263, 264; *Snook*, 2 Hilt. 566.

3 See *Day v. Brownrigg*, Law R. 10 Ch. Div. 204; 48 Law J. Ch. Div. 173; *Du Boulay*, Law R. 2 P. C. 430; 38 L. J. P. C. 35; *Linton*, 10 Fed. Rep. 895; *Clark*, 19 Kan. 522; *Snook*, 2 Hilt. 566; *Johnston v. Goode-now*, 44 Vt. 662; discussed in *Stewart M. & D.* § 438.

§ 62. **Conjugal right of personal custody and restraint.**—1. The husband is the head of the family,<sup>4</sup> where he goes his wife is bound to follow,<sup>5</sup> and he has a farther right of gentle restraint over her movements.<sup>6</sup> He may, by reasonable measures, enforce cohabitation and a common residence,<sup>7</sup> unless, of course, he has lost the right of cohabitation;<sup>8</sup> he may lock her up to prevent her from eloping<sup>9</sup> or going into lewd company and squandering her money,<sup>7</sup> and she will not be released on a writ of habeas corpus;<sup>8</sup> nor is it in itself cruelty if he prevents her visiting her family,<sup>9</sup> or relations,<sup>10</sup> or going to church.<sup>11</sup> But he has no right to confine her unreasonably and arbitrarily,<sup>12</sup> and if he does she will be released on a writ of habeas corpus;<sup>13</sup> so if by moral or physical restraint he injures her health it is

cruelty.<sup>14</sup> In any case he cannot by writ of habeas corpus get possession of her unless she is restrained against her will.<sup>15</sup> If the wife is an infant, the husband or her parents in the discretion of the court is entitled to her custody.<sup>16</sup>

2. If the husband is insane his wife is head of the family and has a right, superior to that of his father, to be his guardian.<sup>17</sup> If, however, she should lock him up to prevent his eloping or keeping lewd company and squandering his property, he would be released on habeas corpus.<sup>18</sup>

1 Glover v. Alcott, 11 Mich. 471, 485; *ante*, § 63.

2 Babbitt, 69 Ill. 277, 279; *ante*, §§ 29, 63.

3 2 Blackst. Com. 445; 2 Kent Com. 181; *Commonw. v. Barry*, 2 Green Cr. Rep. 285, 289, n; *post*, § 63.

4 Cochrane, 8 Dowl. P. C. 630, 636; Price, 2 Fost. & F. 233, 264.

5 Cochrane, 8 Dowl. P. C. 630, 634; *ante*, § 59.

6 Cochrane, 8 Dowl. P. C. 630, 633; *State v. Craton*, 6 Ired. 164.

7 Lister, 1 Strange, 477; 8 Mod. 22, 23.

8 Cochrane, 8 Dowl. P. C. 630.

9 Waring, 2 Phillim. 132; 1 Eng. 210, 213.

10 And see *Fulton*, 36 Miss. 517, 528.

11 Lawrence, 3 Paige, 267, 272.

12 Kelly, Law R. 2 P. & D. 31, 34, 37.

13 Lister, 8 Mod. 22, 23.

14 Kelly, Law R. 2 P. & D. 31, 32. See *Stewart M. & D.* §§ 261-273.

15 Sandilands, 12 Eng. L. Eq. 463, 465; 17 Jur. 317; 21 Law J. Q. B. 312; *Rex v. Leggatt*, 13 Q. B. 781; *Rex v. Wiseman*, 2 Smith, 617.

16 *Gibbs v. Brown*, 63 Ga. 803, 804.

17 *Robinson v. Frost*, 54 Vt. 105, 110; 41 Am. Rep. 835.

18 The question seems never to have arisen.

§ 63. *Conjugal right of personal chastisement.*—Violence of one spouse against the other may be assault and battery,<sup>1</sup> and cruelty;<sup>2</sup> the party guilty of such violence may be punished by the State,<sup>3</sup> and the other party may leave him or her and may apply for a divorce.<sup>4</sup> Though the old writers say that a husband may chastise his wife with a rod no thicker than his thumb,<sup>5</sup> in modern times the rule of love has super-

seded the rule of force,<sup>6</sup> and even among the lower classes<sup>7</sup> a husband has no right to beat his wife at all,<sup>8</sup> even if she is drunk<sup>9</sup> or insolent.<sup>10</sup> If she dies from his beating he is guilty of manslaughter at least.<sup>11</sup> A husband, therefore, may use violence against his wife only in self-defense,<sup>12</sup> or in restraining her from the commission of some tort<sup>13</sup> or crime.<sup>14</sup> Wife whipping is in many States a special misdemeanor.<sup>15</sup>

1 Owen v. State, 7 Tex. App. 323, 337; *ante*, §§ 47, 49.

2 Stewart M. & D. §§ 261-273.

3 *Ante*, §§ 47, 49.

4 Stewart M. & D. §§ 173, 257, 261-273.

5 See Blackst. Com. 444, 445; Trowbridge v. Carlin, 12 La. An. 882; Adams, 100 Mass. 365, 370; 1 Am. Rep. 111; Bradley v. State, 1 Miss. 156, 157, 158; State v. Oliver, 70 N. C. 60, 61; Richards, 1 Grant Cas. 339, 392.

6 Fulgham v. State, 46 Ala. 143, 148; Schoul. H. & W. § 68.

7 Fulgham v. State, 46 Ala. 143, 147.

8 Pearman, 1 Swab. & T. 601, 602; Prichard, 3 Swab. & T. 523; Kelly, Law R. 2 Pro. & D. 31, 59; Carpenter, Milw. 159; Saunders, 1 Rob. Ecc. 549; Fulgham v. State, 46 Ala. 143, 145; State v. Buckley, 2 Har. (Del.) 552; Gholston, 31 Ga. 625, 635; Knight, 31 Iowa, 451, 459; Trowbridge v. Carlin, 12 La. An. 882; Commonw. v. McAfee, 108 Mass. 458, 461; 11 Am. Rep. 383; Bardley v. State, 1 Miss. 156, 157; Poor, 8 N. H. 307, 313; 20 Am. Dec. 604; Perry, 2 Paige, 591, 593; State v. Oliver, 70 N. C. 60, 61; Taylor, 76 N. C. 433, 435; State v. Rhodes, 1 Phill. (N. C.) 453; Bascom, Wright, 632; James v. Commonw. 12 Serg. & R. 220, 226; Edmonds, 57 Pa. St. 232; Gorman v. State, 42 Tex. 221, 223; Owen v. State, 7 Tex. App. 323, 337; Shackett, 41 Vt. 195, 197; Pillar, 22 Wis. 658; People v. Winters, 2 Park. Cr. C. 10; Richards, 1 Grant Cas. 339, 392; Stewart M. & D. §§ 266, 269, 270.

9 Pearman, 1 Swab. & T. 601, 602; Commonw. v. McAfee, 108 Mass. 458, 461; 11 Am. Rep. 383.

10 Commonw. v. McAfee, 108 Mass. 458, 461; 11 Am. Rep. 383.

11 Commonw. v. McAfee, 108 Mass. 458, 461; 11 Am. Rep. 383.

12 Gorman v. State, 42 Tex. 221, 223; Stewart M. & D. § 270.

13 People v. Winters, 2 Park. Cr. C. 10.

14 Richards, 1 Grant Cas. 339, 392. See Commonw. v. Wood, 97 Mass. 225, 229; Commonw. v. Barry, 2 Green Cr. Rep. 285, 287 n.

15 Ga. Code 1873, § 4573; Md. Acts 1302, ch. 120, p. 132.

§ 64. *Conjugal right of support.*—A husband is bound to support his wife, and a wife may be bound to support her husband. Both husband and wife may be bound to support the family.

1. *The husband's liability.* By the common law a husband, though an infant,<sup>1</sup> is bound to support his wife.<sup>2</sup> He cannot charge her or her estate with the expenses of her support.<sup>3</sup> The wife may directly enforce this obligation of his by a suit for maintenance,<sup>4</sup> or for alimony with divorce,<sup>5</sup> or indirectly enforce it by pledging his credit to others who provide her with necessaries.<sup>6</sup> The husband's neglect of this duty, if it results in the wife's death, is manslaughter at least;<sup>7</sup> it may be punishable criminally by statute;<sup>8</sup> and by statute it may be a cause for divorce<sup>9</sup>; but it is not in itself a cause for divorce,<sup>10</sup> as desertion<sup>11</sup> or cruelty.<sup>12</sup> This obligation cannot, however, be enforced if the wife has sufficient means of her own,<sup>13</sup> or has waived<sup>14</sup> or forfeited<sup>15</sup> her rights. She may waive her rights for valuable consideration,<sup>16</sup> as in a deed of separation.<sup>17</sup> She forfeits them by leaving her husband against his will when he is not in fault,<sup>18</sup> or by his leaving her for her fault;<sup>19</sup> but not by becoming insane.<sup>20</sup> The husband's obligation to support his wife is not removed by married women's separate property acts,<sup>21</sup> except so far as they give her means of her own.<sup>22</sup> This right ceases with divorce,<sup>23</sup> but may continue some time after the husband's death.<sup>24</sup>

2. *The wife's liability.* By the common law all a wife's personalty,<sup>25</sup> and all her earnings and labor,<sup>26</sup> belong to her husband; and even under separate earnings acts she is still his helpmeet, and cannot charge him for domestic services;<sup>27</sup> in this way she is bound to support him. In many States statutes provide various means of compelling a wife to support her needy husband;<sup>28</sup> these statutes seem to have raised no questions.<sup>29</sup>

3. *Their joint liability.* Husband and wife are jointly liable for the support of their family,<sup>30</sup> so far at least



that one cannot recover from the other for expenses paid.<sup>31</sup> So statutes in some States make them jointly liable.<sup>32</sup>

1 *Cantine v. Phillips*, 5 Har. (Del.) 423, 429. Compare *post*, § 67, n. 7.

2 See *Zeigler v. David*, 23 Ala. 127, 137; *Washburn*, 9 Cal. 475, 477; *Shelton v. Pendleton*, 13 Conn. 417, 421; *Cantine v. Phillips*, 5 Har. (Del.) 423, 429; *Roney v. Wood*, 1 Wils. 378; *Cooper v. Ham*, 49 Ind. 393, 416; *Litson v. Brown*, 26 Ind. 489, 491; *Graves*, 36 Iowa, 310, 312; 14 Am. Rep. 525; *Com. v. Fletcher*, 6 Bush, 171, 172; *Garland*, 50 Miss. 694, 716; *Allen v. Aldrich*, 29 N. H. 63, 73; *Miller*, 1 N. J. L. 386; *Pomerooy v. Wells*, 8 Paige, 406, 411; *Gage v. Dauchy*, 24 N. Y. 293, 297; *State v. Ransell*, 41 Conn. 433, 440.

3 *Grant v. Green*, 41 Iowa, 83, 91. See *Rogers v. Boyd*, 33 Ala. 175; *Neil v. Johnson*, 11 Ala. 615; *Strong v. Skinner*, 4 Barb. 546; *Methodist v. Jaques*, 1 Johns. Ch. 450; *Callahan v. Patterson*, 4 Tex. 61; *McCormick*, 7 Leigh, 66.

4 *Stewart M. & D.* § 170.

5 *Stewart M. & D.* §§ 353-359.

6 *Stewart M. & D.* § 150.

7 *Reg. v. Plummer*, 1 Car. & K. 690; *Desty Crim. L.* §§ 57 a, 87 a.

8 See Conn. Acts, 1861, p. 79; *Stewart M. & D.* § 177.

9 *Stewart M. & D.* §§ 270-281.

10 *Stewart M. & D.* § 176.

11 *Mandigo*, 15 Vt. 786, 787; *Stewart M. & D.* § 252.

12 *Peabody*, 104 Mass. 195, 197; *Stewart M. & D.* § 269.

13 *Kinsey*, 37 Ala. 393, 396; *Stewart M. & D.* §§ 179, 180, 372.

14 *Fredd v. Eves*, 4 Har. (Del.) 385, 387; *Honey v. Sargent*, 54 Cal. 395, 398; *Stewart M. & D.* §§ 179, 180, 190, 372, 382.

15 *Whale*, 71 Ill. 510, 513; *Dexon v. Hurrell*, 8 Car. & P. 717, 719; *Stewart M. & D.* §§ 179, 180, 371.

16 *Pearson v. Darrington*, 32 Ala. 227, 243. See *ante*, CONTRACTS BETWEEN HUSBAND AND WIFE, §§ 40-46.

17 *Stewart M. & D.* §§ 181-192, 382; *ante*, §§ 43-46.

18 *Schnuckle v. Dierman*, 89 Ill. 454, 457; *Stewart M. & D.* §§ 175, 179, 180, 371.

19 *Hardie v. Grant*, 8 Car. & P. 512, 517; *Stewart M. & D.* §§ 175, 179, 180, 371, 436.

20 *Wray*, 33 Ala. 157, 190; *Wray v. Cox*, 24 Ala. 337, 343; *Stewart M. & D.* §§ 176, 179. See *Goodale v. Brockner*, 25 Hun, 621.

21 *Suttle v. Chicago*, 42 Iowa, 518, 522; *Ransom*, 27 Mich. 563, 574; *Hoyt v. White*, 46 N. H. 45, 46; *Markley v. Wartman*, 9 Phila. 236; *supra*, n. 3; *ante*, §§ 12, 14. See *Dunbar v. Meyer*, 43 Miss. 679.

22 *Supra*, n. 13.

23 *Stewart M. & D.* § 436.

24 *Stewart M. & D.* § 459.

25 *Post*, §§ 163-183.

26 *Post*, § 65.

27 *Mewhirter v. Halten*, 42 Iowa, 288, 292; 20 Am. Rep. 613; *post*, § 65.

28 English Marr. Woman's Act, 1882, c. 75, § 20; Cal. Civ. Code, § 176; Iowa R. C. 1880, § 2226; Mass. P. S. 1882, p. 817, § 36; N. J. Rev. 1877, p. 308; Nev. R. S. 1873, § 174; Vt. R. S. 1880, § 2377.

29 Small, 42 Iowa, 111, 112, seems to be the only case.

30 Stewart M. & D. § 404; *post*, § 387.

31 Finch, 22 Conn. 411, 418, 419; Fitler, 33 Pa. St. 50, 57.

32 Ala. Code, 1876, §§ 2705, 2706; Iowa R. C. 1880, § 2214. See *Baker v. Flournoy*, 58 Ala. 659; *Jones v. Glass*, 48 Iowa, 345.

§ 65. **Right to spouse's time, services, wages, earnings, etc.**—While a wife has no right as wife to her husband's services, except such as is incidental to her right to support,<sup>1</sup> a husband is by the common law entitled as husband to his wife's time, wages, earnings, and the products of her labor, skill, and industry.<sup>2</sup> He may contract to furnish her services to others.<sup>3</sup> He sues for the price of them,<sup>4</sup> as for the loss of them,<sup>5</sup> in his own name.<sup>6</sup> She cannot release an obligation for them,<sup>7</sup> except as his agent,<sup>8</sup> or by his consent.<sup>9</sup> Even if her earnings have been invested by her in her own name, the investment *pro tanto*<sup>10</sup> is his,<sup>11</sup> and liable to his creditors.<sup>12</sup> If he dies her earnings acquired before his death go to his representatives.<sup>13</sup> The husband may forfeit this right by desertion, it seems,<sup>14</sup> so he may waive it,<sup>15</sup> or it may be taken from him by statute.<sup>16</sup>

1. *Gift by husband to wife of her services.* The wife's earnings, etc., may be secured to her separate use by an antenuptial<sup>17</sup> or postnuptial<sup>18</sup> settlement.<sup>19</sup> The ability to earn is not property,<sup>20</sup> and the husband may therefore waive his right to have his wife labor for his use, even as against creditors;<sup>21</sup> but moneys received or due for labor, i. e., earnings, are property,<sup>22</sup> and though a husband may give his wife her earnings,<sup>23</sup> such gift, like that of any other property,<sup>24</sup> must not defraud creditors.<sup>25</sup> The burden lies upon the wife to clearly prove the gift.<sup>26</sup>

2. *Effect of modern married women acts.* Married

women's property acts which do not specifically mention her earnings, etc., do not change the husband's common-law rights to the same.<sup>27</sup> So a statute which provides that a wife "may" earn money *on her separate account* does not affect any earnings of hers unless they appear to have been acquired by her on her separate account.<sup>28</sup> But in most of the States statutes expressly provide that the wife's earnings "shall be" her separate property,<sup>29</sup> and that she may trade on her separate account.<sup>30</sup> Under such statutes the product of all labor of hers for parties other than her husband belongs to her;<sup>31</sup> she can contract<sup>32</sup> for her services and recover on the contract;<sup>33</sup> she can sue alone for them,<sup>34</sup> and make her husband, if need be, garnishee;<sup>35</sup> a debt due by her husband cannot be set off against her in such suit,<sup>36</sup> and neither her husband<sup>37</sup> nor his creditors<sup>38</sup> have any right to such earnings, though, as with her other separate property,<sup>39</sup> she may give them to her husband,<sup>40</sup> and such a gift is presumed, it seems, if with her consent and without promising to repay her<sup>41</sup> he uses them,<sup>42</sup> or mixes them with his own money.<sup>43</sup> But these statutes do not impliedly authorize her contracts with her husband for services,<sup>44</sup> and she cannot recover from him for services rendered,<sup>45</sup> though she may, it seems, if the statute or some other statute expressly authorizes contracts between husband and wife;<sup>46</sup> she is still bound without charge to look after his home and children,<sup>47</sup> and to perform the domestic conjugal duties of wife;<sup>48</sup> she is still his "helpmeet."<sup>49</sup> These statutes are prospectively construed;<sup>50</sup> indeed, they could not deprive the husband of money for her services, already paid or due.<sup>51</sup>

1 See Stewart M. & D. §§ 179, 180; *ante*, § 64.

2 Cecil v. Juxon, 1 Atk. 278, 279; Seitz v. Mitchell, 94 U. S. 580, 584; Glenn v. Johnson, 18 Wall. 476, 478; Todd, 15 Ala. 743, 744; McLemore v. Pinkston, 31 Ala. 267, 270; Hinman v. Parkis, 33 Conn. 188, 197;

Hazelbaker v. Goodfellow, 64 Ill. 237, 241; Cranor v. Winters, 75 Ind. 301, 303; Glover v. Alcott, 11 Mich. 471, 482; Henderson v. Warmack, 27 Miss. 830, 834; Hoyt v. White, 46 N. H. 172, 175; Skillman, 15 N. J. Eq. 478, 481; 13 N. J. Eq. 403, 406; Filer v. R. R. 49 N. Y. 47, 56; 10 Am. Rep. 327; Kee v. Vasser, 2 Ired. Eq. 553, 555; 40 Am. Dec. 442; Raybold, 29 Pa. St. 308, 311; Hollowell v. Horter, 35 Pa. St. 375, 380; Boozer v. Addison, 2 Rich. Eq. 273, 275; Jones v. Reid, 12 W. Va. 350, 355; 29 Am. Rep. 455; Connors, 4 Wis. 112, 117; Elliott v. Bentley 17 Wis. 591, 594.

3 Harrington v. Gies, 45 Mich. 371, 375.

4 Cranor v. Winters, 75 Ind. 301, 303; Skillman, 15 N. J. Eq. 403, 407.

5 Brooks v. Schwerin, 51 N. Y. 343, 343; Filer v. R. R. 49 N. Y. 47, 56; 10 Am. Rep. 327.

6 Hawes Parties to Actions, 58, 63, 64, 65.

7 Skillman, 15 N. J. Eq. 403, 406; 15 N. J. Eq. 473, 481.

8 Kowing v. Manly, 49 N. Y. 192, 197; 10 Am. Rep. 316; *post*, §§ 89, 93.

9 Hinman v. Parkis, 33 Conn. 188, 197; *infra*, notes, 17-26.

10 Apple v. Ganong, 47 Miss. 189, 199. But he has no right against her separate property for services rendered it by her: Holcomb v. Peoples, 9 Ind. 338.

11 Apple v. Ganong, 47 Miss. 189, 199; *infra*, n. 12.

12 Swartz v. Saunders, 43 Ill. 18, 21; Duncan v. Roselle, 15 Iowa, 501, 503; Henderson v. Warmack, 27 Miss. 830, 835; Apple v. Ganong, 47 Miss. 189, 199; Cramer v. Reford, 17 N. J. Eq. 368, 380; Raybold, 29 Pa. St. 308, 311; Campbell v. Bowles, 30 Gratt. 652.

13 Todd, 15 Ala. 733, 741; Stewart M. & D. §§ 464, 465. But see Boozer v. Addison, 2 Rich. Eq. 273, 275, 282.

14 See Mason v. Mitchell, 3 Hurl. & C. 528, 532; Rees v. Waters, 9 Watts, 90, 94; Starrett v. Wynn, 17 Serg. & R. 170; 17 Am. Dec. 651; Stewart M. & D. § 177.

15 Peterson v. Mulford, 36 N. J. L. 481, 487; *infra*, notes, 17-26.

16 Mewhirter v. Halten, 42 Iowa, 288, 291, 293; 29 Am. Rep. 618; *infra*, notes, 27-51.

17 Andrews, 8 Conn. 79, 85; Keith v. Wombell, 3 Pick. 211, 213; Stewart M. & D. §§ 32-43.

18 Skillman, 15 N. J. Eq. 478, 481; 13 N. J. Eq. 403, 407; Stewart M. & D. §§ 181, 193.

19 *Post*, §§ 99-134, 197-216.

20 See Peterson v. Mulford, 36 N. J. L. 481, 487; Hoyt v. White, 46 N. H. 45, 47; Abbey v. Deyo, 44 N. Y. 343, 347; Rush v. Vought, 55 Pa. St. 437, 445; Hodges v. Cobb, 8 Rich. 50, 56.

21 Hoyt v. White, 46 N. H. 45, 47; Peterson v. Mulford, 36 N. J. L. 482, 487; Quidort v. Pergeaux, 18 N. J. Eq. 472, 479.

22 See Hazelbaker v. Goodfellow, 64 Ill. 238, 241.

23 McLemore v. Pinkston, 31 Ala. 267, 269; Glaze v. Blake, 56 Ala. 379; Haden v. Ivey, 51 Ala. 381, 385; Andrews, 8 Conn. 79, 85; Hinman v. Parkis, 33 Conn. 188, 197; Oglesby v. Hall, 30 Ga. 386, 390; Hazelbaker v. Goodfellow, 64 Ill. 238, 241; Cranor v. Winters, 75 Ind. 301, 303; Basham v. Chamberlain, 7 Mon. B. 413, 445, 446; Keith v. Wombell, 3 Pick. 211, 213; Hoyt v. White, 46 N. H. 45, 47; Quidort v. Pergeaux, 18 N. J. Eq. 478, 481; 13 N. J. Eq. 403, 407; Peterson v. Mulford

36 N. J. L. 481, 487; *Kee v. Vasser*, 2 Ired. Eq. 553, 555; *Elliott v. Bentley*, 17 Wis. 591, 596; *Connors*, 4 Wls. 112, 117.

24 *Bump Fraud. Convey.* 22, 23.

25 *Hazelbaker v. Goodfellow*, 64 Ill. 238, 241; *Basham v. Chamberlain*, 7 Mon. B. 443, 445, 446; *Keith v. Woombell*, 8 Pick. 211, 213; *Kramer v. Reford*, 17 N. J. Eq. 367, 380; *post*, §§ 113-118.

26 *McLemore v. Pinkston*, 31 Ala. 267, 270; *Skillman*, 15 N. J. Eq. 478, 481; 13 N. J. Eq. 403, 407; *post*, §§ 119, 121.

27 *Seitz v. Mitchell*, 94 U. S. 580, 584; *Mitchell v. Seitz*, 1 McAr. 489, 493; *McLemore v. Pinkston*, 31 Ala. 267, 270; *Carleton v. Rivers*, 54 Ala. 467; *Bear v. Hays*, 38 Ill. 280, 281; *Farrell v. Patterson*, 43 Ill. 52, 53; *Conner v. Berry*, 46 Ill. 370, 372; *Swartz v. Saunders*, 46 Ill. 18, 24; *McMurtry v. Webster*, 48 Ill. 123, 124; *Marshall v. Duke*, 51 Ind. 61, 62; *Duncan v. Roselle*, 15 Iowa, 501, 503; *Merrill v. Smith*, 37 Me. 394, 396; *Glover v. Alcott*, 14 Mich. 470, 482; *Henderson v. Warmack*, 27 Miss. 830, 835; *Apple v. Ganong*, 47 Miss. 187, 199; *Hoyt v. White*, 46 N. H. 45, 47; *Quidort v. Pergeaux*, 18 N. J. Eq. 472, 480; *Rider v. Hulse*, 33 Barb. 264, 270; *Syme v. Riddle*, 88 N. C. 463, 465; *Raybold*, 20 Pa. St. 308, 311.

28 *McClusky v. Provident*, 103 Mass. 300, 304, 305; *Blackback v. Achroyd*, 11 Hun, 365, 366; *Bean v. Kiah*, 4 Hun, 171, 174; *ante*, §§ 16-18.

29 See *Meriwether v. Smith*, 44 Ga. 541, 543; *Martin v. Robson*, 65 Ill. 129, 135; 16 Am. Rep. 578; *Musgrove*, 54 Ill. 186, 188; *Bradstreet v. Baer*, 41 Md. 19, 25; *Atteberg*, 8 Oreg. 221.

30 See *Haas v. Shaw*, 91 Ind. 384, 396; *Orrell v. Van Gorder*, 96 Pa. St. 180.

31 *Brooks v. Schwerin*, 54 N. Y. 343, 348; *infra*, notes 32-42; *supra*, n. 2).

32 *Larimer v. Kelly*, 10 Kan. 298, 305.

33 *Larimer v. Kelly*, 10 Kan. 298, 305; *Cooper v. Alger*, 51 N. H. 172, 175.

34 *Turnks v. Grover*, 57 Me. 586, 588. *S. P. Allen v. Eldridge*, 1 Colo. 288; *Meriwether v. Smith*, 44 Ga. 543; *Fowle v. Tidd*, 15 Gr. 94; *Burke v. Cole*, 97 Mass. 114; *Cooper v. Alger*, 51 N. H. 174, 175. But see *Gay v. Rogers*, 18 Vt. 342.

35 *Turnks v. Grover*, 57 Me. 586, 588.

36 *Whiting v. Beckwith*, 31 Conn. 553, 555.

37 *Brooks v. Schwerin*, 54 N. Y. 343, 348.

38 *Glenn v. Johnson*, 18 Wall. 476, 478.

39 In equity; *Andrews v. Huckabee*, 30 Ala. 143, 152. At law, see 20 Alb. L. J. 285, 286.

40 See *Shaeffer v. Sheppard*, 54 Ala. 244; *Bowden v. Gray*, 49 Miss. 547; *Quidort v. Pergeaux*, 18 N. J. Eq. 372, 480; *Hallowell v. Horter*, 25 Pa. St. 375, 380.

41 See *Hill*, 38 Md. 183, 185.

42 *Hallowell v. Horter*, 25 Pa. St. 375, 380.

43 *Quidort v. Pergeaux*, 18 N. J. Eq. 472, 480. Consult cases *supra*, n. 23.

44 *Hazelbaker v. Goodfellow*, 64 Ill. 238, 241; *Mewhlrter v. Halten*, 42 Iowa, 288, 291, 293; 20 Am. Rep. 618; *Grant v. Green*, 41 Iowa, 88, 91, 92; *Glover v. Alcott*, 11 Mich. 471, 483; *Brooks v. Schwerin*, 54 N. Y. 243, 348; *Reynolds v. Robinson*, 64 N. Y. 589, 593; *Bean v. Kiah*, 4 Hun, 171, 174; 20 Alb. L. J. 235, 236.

45 *Mewhirter v. Halten*, 42 Iowa, 288, 293; 26 Am. Rep. 618. See *supra*, n. 41; *Shaeffer v. Sheppard*, 54 Ala. 244.

46 *Reynolds v. Robinson*, 64 N. Y. 580, 593.

47 *Mewhirter v. Halten*, 42 Iowa, 288, 292; 20 Am. Rep. 618.

43 *Glover v. Alcott*, 11 Mich. 471, 483.

49 *Mewhirter v. Halten*, 42 Iowa, 288, 292; 20 Am. Rep. 618.

50 As to all statutes, see *infra*, n. 51; *ante*, § 21.

51 *Farrell v. Patterson*, 40 Ill. 52, 53; *Jassay v. Dellus*, 65 Ill. 469, 471; *McDavid v. Adams*, 77 Ill. 155, 156; *Kase v. Painter*, 77 Ill. 543, 544; *Rider v. Hulse*, 33 Barb. 264, 271; *ante*, § 23.

§ 66. *Conjugal liability in tort.*—There is no liability of wife as wife for torts of her husband, but a husband as husband is generally liable for his wife's torts.

1. *Wife's antenuptial torts.* A husband, at common law, takes his wife with all her liabilities<sup>1</sup> and is liable for her antenuptial torts<sup>2</sup> for the same reasons and to the same extent as he is liable for her antenuptial contracts;<sup>3</sup> and to the same extent also, as he is liable for her postnuptial torts committed out of his presence and without his directions.<sup>4</sup> Thus, for the wife's antenuptial tort husband and wife must be jointly sued;<sup>5</sup> (his liability, however, depends on his being her lawful husband;<sup>6</sup>) the Statute of Limitations runs in favor of both of them;<sup>7</sup> the husband's liability must be fixed by judgment before dissolution of the marriage by death<sup>8</sup> or divorce,<sup>9</sup> while the wife's survives;<sup>10</sup> and a judgment against them binds the property of them both.<sup>11</sup> This liability extends to acts done by her in a representative capacity, for example as guardian<sup>12</sup> or administratrix.<sup>13</sup> It is in many States removed by express statutes,<sup>14</sup> but the weight of opinion is that it is not affected through implication, by married women's property acts.<sup>15</sup>

2. *Wife's postnuptial torts.* A husband, at common law, is liable for all torts committed by his wife during coverture,<sup>16</sup> it makes no difference if they are living apart,<sup>17</sup> so long as he is really her husband.<sup>18</sup> But he

cannot, unless his wife is his agent in fact,<sup>19</sup> be liable for a wrong of hers based on her invalid contract,<sup>20</sup> as where she got credit by pretending she was unmarried,<sup>21</sup> or misappropriated money placed in her keeping.<sup>22</sup> And though if he allows her to act as administratrix he is responsible for all her acts,<sup>23</sup> her unauthorized dealing with an estate does not render him liable *as executor de son tort*.<sup>24</sup> For her torts he may be liable alone or jointly with her: (1) If the tort is committed in his presence and nothing more appears, it is his sole tort,<sup>25</sup> for she is presumed to have acted under his coercion.<sup>26</sup> (2) If the tort is committed in his presence, but it appears that she acted of her own free will, they are jointly liable.<sup>27</sup> (3) If the tort is committed in his presence against his will, it is her tort and he is liable with her.<sup>28</sup> (4) If the tort is committed out of his presence, but by his direction, she is liable jointly with him.<sup>29</sup> (5) If the tort is committed out of his presence and without his knowledge or consent he is liable with her.<sup>30</sup> In cases (1), (2), and (4), he is liable because she is his agent<sup>31</sup> and to the same extent as any other master is for the acts of his servant.<sup>32</sup> In cases (3) and (5) he is liable because she is his wife,<sup>33</sup> and as with her antenuptial contracts<sup>34</sup> and antenuptial torts,<sup>35</sup> his liability—unless it has been fixed by judgment<sup>36</sup>—ceases with the dissolution of the marriage.<sup>37</sup> In case (1) she cannot be sued.<sup>38</sup> In cases (3) and (5) he cannot be sued *as joint wrong-doer*—the suit must be against him *as husband*.<sup>39</sup> In cases (2) and (4) they are jointly liable for a joint tort<sup>40</sup>—though it is said that a joint slander is an impossibility,<sup>41</sup> and that a conversion is to the husband, not to “their” use;<sup>42</sup> and the husband has full control of the suit.<sup>43</sup> This liability of the husband *as husband* has been removed by express statute in some States;<sup>44</sup> but

in spite of statutes his liability for his wife's acts as his agent remains.<sup>45</sup> But this liability is not affected by general married women's property acts,<sup>46</sup> (except in Illinois<sup>47</sup> and Kansas<sup>48</sup>) or even by a provision that a husband shall not be liable for his wife's "debts."<sup>49</sup> Still, when as to her separate property she may sue and be sued without her husband,<sup>50</sup> he is not liable, unless he took part therein, for her tort connected with it<sup>51</sup>—as for her cattle's depredations<sup>52</sup> or a nuisance on her farm.<sup>53</sup> But when in her separate business she receives stolen goods and becomes thereby liable in conversion, her husband is liable because she never acquired any property in the goods.<sup>54</sup> Nor is he liable for the acts of an insane wife.<sup>55</sup>

1 Ferguson v. Collins, 8 Ark. 241, 252; Hawk v. Harman, 5 Binn. 43, 50.

2 Ferguson v. Collins, 8 Ark. 241, 252; Phillips v. Richardson, 4 Marsh. J. J. 212, 215; Brown v. Kemper, 27 Md. 666, 672; Magruder v. Darnall, 6 Gill, 269, 286; McCready, 1 Tuck. 371, 375; Hawk v. Harman, 5 Binn. 43, 50; Overholt v. Ellswell, 1 Ashm. 200, 202; Hubble v. Fogartie, 3 Rich. 413, 415; Allen v. McCullough, 2 Heisk. 174, 182; cases cited *infra*, n. 16.

3 See Heard v. Stamford, 3 P. Wms. 407, 412; Hawk v. Harman, 5 Binn. 43, 50; *post*, § 67.

4 See Baker v. Young, 42 Ill. 42, 43; *infra*, n. 30.

5 Brown v. Kemper, 27 Md. 666, 672; Magruder v. Darnall, 6 Gill 269, 286; McCready, 1 Tuck. 374, 375; Overholt v. Ellswell, 1 Ashm. 200, 202; 1 Chit. Pl. 81, 92.

6 Overholt v. Ellswell, 1 Ashm. 200, 202.

7 Hawk v. Harman, 5 Binn. 43, 50.

8 Ferguson v. Collins, 8 Ark. 241, 252; Phillips v. Richardson, 4 Marsh. J. J. 212, 214; Allen v. McCullough, 2 Heisk. 174, 184; 5 Am. Rep. 27; Stewart M. & D. § 468.

9 Ferguson v. Collins, 8 Ark. 241, 252; Stewart M. & D. § 448. But see Allen v. McCullough, 2 Heisk. 174, 180; 5 Am. Rep. 27.

10 Ferguson v. Collins, 8 Ark. 241, 252. Compare Fultz v. Fox, 9 Mo. B. 500, 501; *post*, § 67.

11 Brown v. Kemper, 27 Md. 666, 672.

12 Allen v. McCullough, 2 Heisk. 174, 182, 183; 5 Am. Rep. 27.

13 Ferguson v. Collins, 8 Ark. 241, 252; Phillips v. Richardson, 4 Marsh. J. J. 212, 214; Magruder v. Darnall, 6 Gill, 269, 286; Hubble v. Fogartie, 3 Rich. 413, 415.

14 Md. Acts 1880, ch. 253, §§ 31, 32; *post*, § 67; *infra*, n. 41.

15 McElfresh v. Kirkendall, 36 Iowa, 224, 227; *infra*, notes 46, 53; *ante*, §§ 14, 15; *post*, § 67.



16 *Wright v. Kerr*, Addis. 13; *Vine v. Saunders*, 5 Scott, 359, 370; *Head v. Briscoe*, 5 Car. & P. 484, 483; *Taylor v. Greene*, 8 Car. & P. 316, 319; *Atty.-Gen. v. Riddle*, 2 Crompt. & J. 493; *Hope v. Carnegie*, Law R. 7 Eq. 254; *Bohe v. Frowner*, 18 Ala. 89, 95; *Ferguson v. Collins*, 8 Ark. 241, 252; *Baker v. Young*, 44 Ill. 42, 48; *Martin v. Robson*, 65 Ill. 129, 130; 16 Am. Rep. 573; *Ball v. Bennett*, 21 Ind. 427, 423; *Choen v. Porter*, 66 Ind. 194, 196; *McElfresh v. Kirkendall*, 36 Iowa, 224, 227; *Enders v. Beck*, 18 Iowa, 86, 87; *Phillips v. Richardson*, 4 Marsh. J. J. 212, 214; *Hinds v. Jones*, 48 Me. 348, 349; *Ferguson v. Brooks*, 67 Me. 251, 255; *Marshall v. Oakes*, 51 Me. 308, 309; *Nolan v. Traber*, 49 Md. 460, 463; *Handy v. Foley*, 121 Mass. 259, 261; 23 Am. Rep. 270; *Heckle v. Lurvey*, 101 Mass. 344, 345; 3 Am. Rep. 366; *Austin v. Cox*, 118 Mass. 53, 60; *Austin v. Wilson*, 4 Cush. 273, 275; *Miller v. Sweitzer*, 22 Mich. 391, 395; *Burt v. McBain*, 29 Mich. 260, 262; *Ricci v. Mueller*, 41 Mich. 214, 215; *Brazil v. Moran*, 8 Minn. 236, 240; *Dailey v. Houston*, 58 Mo. 361, 367; *Cram v. Dudley*, 28 N. H. 537, 541; *Whitman v. Delano*, 6 N. H. 543, 545; *Gove v. Farmers*, 48 N. H. 41, 43; 2 Am. Rep. 168; *Carleton v. Haywood*, 49 N. H. 314, 318; *Scott v. Gamble*, 9 N. J. Eq. 218, 238; *Kowling v. Maudy*, 49 N. Y. 192, 198; 57 Barb. 399, 483; 10 Am. Rep. 346; *Cassin v. Delany*, 38 N. Y. 178, 179; *Matthews v. Flestel*, 2 Smith, E. D. 90, 91; *Barnes v. Harris*, Bush. 15, 17; *Cox v. Hoffman*, 4 Dev. & B. 180, 182; *Clark v. Boyer*, 32 Ohio St. 299, 311; 30 Am. Rep. 593; *Fowler v. Chichester*, 26 Ohio St. 9, 14; *Coolidge v. Parris*, 8 Ohio St. 594, 597; *Keen v. Hartman*, 48 Pa. St. 497, 499; *Moffit v. Commonw.* 5 Pa. St. 359, 366; *McKeown v. Johnson*, 1 McCord, 578, 579; 10 Am. Dec. 698; *Moon v. Henderson*, 4 Desaus. Eq. 459, 461; *McQueen v. Fulgham*, 27 Tex. 463, 467; *Tabb v. Boyd*, 4 Cal. 453, 457; *Roadcap v. Sipe*, 6 Gratt. 213, 217; *Jackson v. Kirby*, 37 Vt. 448, 453; *Woodward v. Barnes*, 46 Vt. 332, 336; 14 Am. Rep. 626; *post*, TORTS OF MARRIED WOMEN.

17 *Head v. Briscoe*, 5 Car. & P. 484, 486.

18 *Overholt v. Ellswell*, 1 Ashm. 200, 202.

19 *See Taylor v. Green*, 8 Car. & P. 316, 318.

20 *Liverpool v. Fairhurst*, 9 Ex. 422; *Andrews v. Ormsbee*, 11 Mo. 400, 402; *Carleton v. Haywood*, 49 N. H. 314, 320; *Keen v. Hartman*, 48 Pa. St. 497, 499; *Barnes v. Harris*, Bush. 15, 17; *Woodward v. Barnes*, 46 Vt. 332, 336; 14 Am. Rep. 626; *post*, § 268.

21 *Woodward v. Barnes*, 46 Vt. 332, 336; 14 Am. Rep. 626; *supra*, n. 20.

22 *Andrews v. Ormsbee*, 11 Mo. 400, 402; *Carleton v. Haywood*, 49 N. H. 314, 320.

23 *Bohe v. Frowner*, 18 Ala. 89, 95; *McCreedy*, 1 Tuck. 374, 376; *Moffit v. Commonw.* 5 Pa. St. 359, 366; *Moon v. Henderson*, 4 Desaus. Eq. 459, 461; *Knox v. Picket*, 4 Desaus. Eq. 92, 93; *Tabb v. Boyd*, 4 Cal. 453, 457.

24 *Hinds v. Jones*, 48 Me. 348, 349.

25 *Ball v. Bennett*, 21 Ind. 427, 428; *Marshall v. Oakes*, 51 Me. 308, 309; *Miller v. Sweitzer*, 22 Mich. 391, 395; *Brazil v. Moran*, 8 Minn. 236, 240; *Dailey v. Houston*, 58 Mo. 361, 367; *Carleton v. Haywood*, 49 N. H. 314, 318; *Cassin v. Delany*, 38 N. Y. 178, 179; *Park v. Hopkins*, 2 Bail. 411, 412; *Sisco v. Cheeney*, *Wright*, 9, 10; *McKeown v. Johnson*, 1 McCord, 578, 579; *McQueen v. Fulgham*, 27 Tex. 463, 467; *Jackson v. Kirby*, 37 Vt. 448, 453.

26 *Nolan v. Traber*, 49 Md. 460, 463; 33 Am. Rep. 277; *supra*, n. 25.

27 *Nolan v. Traber*, 49 Md. 460, 463; 33 Am. Rep. 277; *Carleton v. Haywood*, 49 N. H. 314, 313, 319; *Cassin v. Delany*, 38 N. Y. 178, 179.

H. & W.—9.

23 Carleton v. Haywood, 49 N. H. 314, 315, 319.

29 Handy v. Foley, 121 Mass. 259, 261; 23 Am. Rep. 270; Cassin v. Delany, 33 N. Y. 173, 179; Clark v. Boyer, 32 Ohio St. 289, 311; 39 Am. Rep. 593.

30 Baker v. Young, 44 Ill. 42, 43; Ball v. Bennett, 21 Ind. 427, 428; Eiders v. Beck, 13 Iowa, 86, 87; Heckel v. Lurvey, 101 Mass. 344, 345; 3 Am. Rep. 366; Carleton v. Haywood, 49 N. H. 314, 318; Kowing v. Manly, 49 N. Y. 162, 168; 10 Am. Rep. 346; Matthews v. Fietzel, 2 Smith, E. D. 99, 91; Park v. Hopkins, 2 Bail. 411, 412; Barnes v. Harris, Bush. 15, 17; McQueen v. Fulgham, 27 Tex. 464, 467; *post*, TORTS OF MARRIED WOMEN.

31 Compare *post*, §§ 56, 95.

32 See Cox v. Hoffman, 4 Dev. & B. 139, 182.

33 Ferguson v. Brooks, 67 Me. 251, 255; Park v. Hopkins, 2 Bail. 411, 412.

34 Fultz v. Fox, 3 Mon. D. 400, 500, 501; *post*, § 67.

35 *Supra*, notes 5, 9.

36 Compare Burton, 5 Har. (Del.) 441, 444; *post*, § 67.

37 See Ferguson v. Collins, 8 Ark. 241, 252; Phillips v. Richardson, 4 Marsh. J. J. 212, 214; Cady v. Van Duyne, 9 N. J. Eq. 259, 268; Moffit v. Commonw. 5 Pa. St. 359, 366; Hawk v. Harman, 5 Binn. 43, 50; Allen v. McCullough, 2 Hask. 174, 184; 5 Am. Rep. 27; Stewart M. & D. §§ 44, 463.

38 Ball v. Bennett, 21 Ind. 427, 428; *supra*, n. 25.

39 Ferguson v. Brooks, 67 Me. 251, 255; Park v. Hopkins, 2 Bail. 411, 412; Sisco v. Cheney, Wright, 9, 19.

40 Vine v. Saunders, 5 Scott, 359, 379; Heckel v. Lurvey, 101 Mass. 344, 345; Handy v. Foley, 121 Mass. 259, 261; 23 Am. Rep. 270; Miller v. Switzer, 22 Mich. 301, 305; Carleton v. Haywood, 49 N. H. 314, 319; Roadcap v. Sipe, 6 Gratt. 213, 217.

41 Baker v. Young, 44 Ill. 42, 43; Roadcap v. Sipe, 6 Gratt. 213, 217.

42 Carleton v. Haywood, 49 N. H. 314, 311; Kowing v. Manly, 49 N. Y. 162, 168, 199; 10 Am. Rep. 346.

43 Coolidge v. Parris, 8 Ohio St. 594, 597; see Clark v. Boyer, 32 Ohio St. 289, 311; *post*, SUITS BY MARRIED WOMEN.

44 Ml. Acts 1880, ch. 253, §§ 31, 32; Mass. P. S. 1882, p. 819, § 9; Mich. R. S. 1882, §§ 7714, 8059.

45 Austin v. Cox, 113 Mass. 58, 69; Hill v. Duncan, 119 Mass. 238; Reed v. Mueller, 41 Mich. 214, 215.

46 Choen v. Porter, 66 Ind. 194, 196, 199; McElfresh v. Kirkendall, 33 Iowa, 224, 227; Eiders v. Beck, 13 Iowa, 86, 87; Ferguson v. Brooks, 67 Me. 251, 257; Kowing v. Manly, 57 Barb. 473, 484; Baum v. Mullen, 47 N. Y. 577, 578; McCready, 1 Tuck. 374, 375; Fowler v. Chicester, 26 Ohio St. 9, 14; McQueen v. Fulgham, 27 Tex. 464, 467; *ante*, §§ 15, 16.

47 Martin v. Robson, 63 Ill. 129, 130, 139; 16 Am. Rep. 575.

48 Morris v. Corkhill, S. C. Kan. Oct. 9, 1884.

49 McElfresh v. Kirkendall, 36 Iowa, 224, 227.

50 Hawes Parties to Actions. § 79.

51 Rowe v. Smith, 45 N. Y. 230, 231; Baum v. Mullen, 47 N. Y. 577, 579; Fiske v. Bailey, 51 N. Y. 159, 161.

52 Rowe v. Smith, 45 N. Y. 230, 233.

53 *Fiske v. Bailey*, 51 N. Y. 150, 153.

54 *Nusser v. Lewis*, N. Y. Sup. Ct. June 26, 84; 6 N. Y. Civ. Proc. R. 135.

55 *Gove v. Farmers*, 43 N. H. 41, 43, 44; 2 Am. Rep. 168.

§ 67. **Conjugal liability in contract.**—There is no liability of a wife as wife for contracts of her husband, but a husband as husband is generally liable on his wife's contracts.

1. *Postnuptial*. At common law a wife could generally make no contract during coverture to bind herself,<sup>1</sup> though in certain cases she could as his agent bind him.<sup>2</sup> And when under statute or otherwise she can make a valid contract, as husband he is not liable upon it,<sup>3</sup> though he may be as joint promissor.<sup>4</sup>

2. *Antenuptial*. At common law a husband takes his wife with her liabilities,<sup>5</sup> and he is liable on all her existing contracts,<sup>6</sup> whether he is an adult or an infant,<sup>7</sup> and whether he receives property with her or not.<sup>8</sup> It is only necessary to create his liability that he be really her husband,<sup>9</sup> and that the contract be one which is binding on her;<sup>10</sup> he is even liable for necessities supplied his infant wife before marriage.<sup>11</sup> The wife cannot be sued alone on such a contract,<sup>12</sup> nor can he;<sup>13</sup> the suit is against them jointly.<sup>14</sup> If the suit is pending when the woman marries, it is revived against him also;<sup>15</sup> if judgment has been recovered before marriage, execution may be had against her alone,<sup>16</sup> or by *scire facias* it may be revived against him,<sup>17</sup> and the property of both of them may be taken.<sup>18</sup> The acknowledgment of the debt made after marriage is not, however, evidence against the husband.<sup>19</sup> The husband's liability ceases with coverture, unless it has been fixed by judgment.<sup>20</sup> If she dies after judgment, he continues liable;<sup>21</sup> if he dies, his estate is liable.<sup>22</sup> If not so fixed, the husband's liability is destroyed by

a divorce *a vinculo*.<sup>23</sup> by his death,<sup>24</sup> or by hers.<sup>25</sup> But marriage does not suspend or destroy her liability,<sup>26</sup> so that if he dies she is liable,<sup>27</sup> and if she dies her administrator is liable to the extent of assets,<sup>28</sup> even when he is her widower.<sup>29</sup> So she is liable after divorce *a vinculo*.<sup>30</sup> So the Statute of Limitations runs during coverture,<sup>31</sup> and neither can she sue during coverture as to revive a promise which is barred,<sup>32</sup> nor can her husband revive it against her,<sup>33</sup> and one who waits till after coverture to sue usually loses his remedy.<sup>34</sup> Bankruptcy of the husband destroyed at common law all right of suit during coverture,<sup>35</sup> but when she has separate property she may, perhaps, be proceeded against in equity.<sup>36</sup> An antenuptial<sup>37</sup> or postnuptial<sup>38</sup> agreement has no effect on this conjugal liability, nor have married women's statutes which do not expressly refer to it,<sup>39</sup> though a different rule is adopted in Illinois.<sup>40</sup> But in many States a statute expressly destroys the husband's liability,<sup>41</sup> or limits it to the extent of the property received by him from her by marriage,<sup>42</sup> or continues his liability to this extent after her death.<sup>43</sup> A statute removing his liability may be applicable to existing marriages, as the wife's creditor's right against her husband is not vested;<sup>44</sup> but a statute creating a new liability in the husband after her death applies only to marriages entered into after its passage.<sup>45</sup> In general, the meaning of these statutes is plain, and they are easily construed.<sup>46</sup>

1 *Post*, CONTRACTS OF MARRIED WOMEN, §§ 355-408.

2 *Leeds v. Vail*, 15 Pa. St. 185; *post*. §§ 80, 98.

3 *Holmes v. Reynolds*, 55 Vt. 39, 42. See *Frieber v. Stover*, 30 Ark. 727; *Franklin v. Foster*, 20 Mich. 75; *Hill v. Goodrich*, 46 N. H. 41, 42.

4 *Sturmfeltz v. Frickey*, 43 Md. 569; *Holmes v. Reynolds*, 55 Vt. 39, 42.

5 *Hawk v. Harman*, 5 Binn. 43, 50.

6 *Heard v. Stamford*, 3 P. Wms. 407, 412; *Thomond v. Suffolk*, 1 P. Wms. 462, 469; *Cowley v. Robertson*, 3 Camp. 438, 439; *Humphreys v. Royce*, 1 Moody & R. 140, 141; *Evans v. Chester*, 2 Mees. & W. 847,

813; *Sharkes v. Bell*, 8 Barn. & C. 1, 3; *O'Brien v. Ram*, 3 Mod. 186, 190; *Moore v. Leseur*, 13 Ala. 606, 610; *Gray v. Thacker*, 4 Ala. 136, 137; *Marrison v. Trader*, 27 Ark. 288, 290; *Day v. Messick*, 1 Houst. 328, 329, 330; *Burton*, 5 Har. (Del.) 441, 444; *Bryan v. Doolittle*, 38 Ga. 255, 258; *Prescott v. Fisher*, 22 Ill. 330, 333; *Hawarth v. Warmser*, 58 Ill. 48, 49; *Brown v. Lasselle*, 6 Blackf. 147, 148; 33 Am. Dec. 135; *Crawford v. Terry*, 12 Ind. 427; *Hetrick*, 13 Ind. 41, 45, 46; *Bonney v. Reardin*, 6 Bush, 34, 40; *Morrow v. Whitesides*, 10 Mon. B. 411, 412; *Fultz v. Fox*, 9 Mon. B. 499, 501; *Caldwell v. Drake*, 4 Marsh. J. J. 246, 247; *Hamlin v. Bridge*, 24 Me. 145, 146; *Anderson v. Smith*, 33 Md. 465, 467; *Hawes v. Bigelow*, 13 Mass. 334, 340; *Dickson v. Miller*, 19 Miss. 594, 604; *Ross v. Winners*, 6 N. J. L. 333; *Barnes v. Underwood*, 47 N. Y. 351, 354; *Roach v. Quick*, 9 Wend. 238, 239; *Angel v. Felton*, 8 Johns. 149; *Williams v. Kent*, 15 Wend. 360, 361; *Carlton v. Moore*, 2 Jones Eq. 204, 207; *Wilson*, 30 Ohio St. 365, 371; *Carl v. Wonder*, 5 Watts, 97, 98; *Overholt v. Ellswell*, 1 Ashm. 200; *Buckner v. Smyth*, 4 Desaus. Eq. 371; *Jones v. Walkup*, 5 Sneed, 135, 138; *Parker v. Steed*, 1 Lea, 206, 210; *Taylor v. Miller*, 2 Lea, 153, 154; *Sheppard v. Starke*, 3 Munf. 29, 37; *Cole v. Shurtleff*, 41 Vt. 311, 315, 316; *Cole v. Seely*, 25 Vt. 220, 222; *Farrar v. Bessey*, 24 Vt. 89, 92; *Platner v. Patchen*, 19 Wis. 333, 336.

7 *Roach v. Quick*, 9 Wend. 238, 239; *Cole v. Seeley*, 25 Vt. 220, 222; 60 Am. Dec. 253.

8 *Heard v. Stamford*, 3 P. Wm. 409, 412; *supra*, n. 6.

9 *Cowley v. Robertson*, 3 Camp. 438, 439; *Overholt v. Ellswell*, 1 Ashm. 200.

10 *Caldwell v. Drake*, 4 Marsh. J. J. 246, 247.

11 *Bonney v. Reardin*, 6 Bush, 34, 40; *Anderson v. Smith*, 33 Md. 465, 467.

12 *Hamlin v. Bridge*, 24 Me. 145, 147.

13 *Gage v. Reed*, 15 Johns. 403.

14 *Gray v. Thacker*, 4 Ala. 136, 137; *Moore v. Leseur*, 13 Ala. 606, 610; *Angel v. Felton*, 8 Johns. 141; *Carl v. Wonder*, 5 Watts, 97, 98; *Platner v. Patchin*, 19 Wis. 333, 335.

15 *Parker v. Steed*, 1 Lea, 206, 210.

16 *Evans v. Chester*, 2 Mees. & W. 847, 848; *Cooper v. Hunchin*, 4 East, 521, 522.

17 *Taylor v. Miller*, 2 Lea, 153, 154. See *O'Brien v. Ram*, 3 Mod. 186, 187, 190; *Haines v. Corliss*, 4 Mass. 659.

18 *Benyon v. Jones*, 15 Mees. & W. 566, 569; *Taylor v. Miller*, 2 Lea, 153, 155.

19 *Brown v. Lasselle*, 6 Blackf. 147, 148; 33 Am. Dec. 135; *Ross v. Winners*, 6 N. J. L. 336; *Sheppard v. Starke*, 3 Munf. 29, 37; *ante*, § 56.

20 *Fultz v. Fox*, 9 Mon. B. 499, 500, 501; *Bryan v. Doolittle*, 38 Ga. 255, 258; *Burton*, 5 Har. (Del.) 441, 444.

21 *Bryan v. Doolittle*, 38 Ga. 255, 257.

22 *Burton*, 5 Har. (Del.) 441, 444.

23 *Wilson*, 30 Ohio St. 365, 371; *Stewart M. & D.* § 448.

24 *Fultz v. Fox*, 9 Mon. B. 499, 500, 501; *Chapline v. Moore*, 7 Mon. 159; *Mallory v. Vandenheyden*, 3 Barb. Ch. 9, 23; *Carlton v. Moore*, 2 Jones Eq. 204, 207, 209.

25 *Heard v. Stamford*, 3 P. Wm. 409, 411; *Thomond v. Suffolk*, 1 P. Wm. 462, 469; *Bryan v. Doolittle*, 38 Ga. 255, 258; *Williams v. Kent*, 15 Wend. 360, 362; *Jones v. Walkup*, 5 Sneed, 135, 138; *Cole v. Shurtleff*, 41 Vt. 311, 315, 316; *Stewart M. & D.* § 468.

26 *Fultz v. Fox*, 9 Mon. B. 499, 500, 501; *Gage v. Reed*, 15 Johns. 403; *Mallory v. Vanderheyden*, 3 Barb. Ch. 9, 23.

27 *Parker v. Steed*, 1 Lea, 206, 210. See *Hawk v. Harman*, 5 Binn. 43, 50.

28 *Humphrey v. Boyce*, 1 Moody & R. 140, 141; *Mallory v. Vanderheyden*, 3 Barb. Ch. 9, 23; *Jones v. Walkup*, 5 Sneed, 135, 134.

29 *Day v. Messick*, 1 Honst. 328, 330; *Jones v. Walkup*, 5 Sneed, 135, 139; *Holmes*, 28 Vt. 765, 767, 768.

30 See *Stewart M. & D.* § 430, n. 19.

31 *Moore v. Leseur*, 18 Ala. 606, 611; *Kilne v. Guthart*, 2 Pa. St. 490; *Hawk v. Harman*, 5 Binn. 43, 50; *Farrar v. Bessey*, 24 Vt. 89, 92.

32 *Moore v. Leseur*, 18 Ala. 606, 612.

33 *Farrar v. Bessey*, 24 Vt. 89, 92.

34 See *Hawk v. Harman*, 5 Binn. 43, 50.

35 *Miles v. Williams*, 10 Mod. 160, 243; *Mallory v. Vanderheyden*, 3 Barb. Ch. 9, 22.

36 *Dickson v. Miller*, 19 Mass. 594, 602, 604. See *Hamlin v. Bridge*, 24 Me. 145, 146. Consult *Jones v. Glass*, 48 Iowa, 345.

37 *Harrison v. Trader*, 27 Ark. 288, 290; *Christian v. Hanks*, 22 Ga. 125; *Taylor v. Miller*, 2 Lea, 153, 154; *Powell v. Manson*, 22 Gratt. 177; *Stewart M. & D.* §§ 32, 43.

38 *Harrison v. Trader*, 27 Ark. 288, 290; *Stewart M. & D.* § 181.

39 *Conner v. Berry*, 46 Ill. 370, 372; *Berley v. Rampacher*, 5 Duer, 183; *Alexander v. Morgan*, 31 Ohio St. 511; *Fowler v. Chichester*, 26 Ohio St. 9; *Platner v. Patchin*, 19 Wis. 333, 336; *ante*, §§ 15, 16.

40 *Howarth v. Warmser*, 58 Ill. 48, 49. See *Dickson v. Miller*, 19 Miss. 594, 603.

41 See Ala. Code, 1876, § 2704; Cal. Civ. Code, § 170; *Wood v. Orford*, 52 Cal. 412; Md. Acts 1880, §§ 31, 32; N. C. Rev. 1873, p. 590; Pa. Purd. Dig. 1872, p. 1006.

42 Colo. R. S. 1877, § 1754.

43 Colo. R. S. 1877, § 1755; *Bryan v. Doolittle*, 38 Ga. 255, 277; *Williams v. Kent*, 15 Wend. 360, 361.

44 *Fultz v. Fox*, 9 Mon. B. 499, 500, 501; *ante*, §§ 21-22; but not to a suit already brought: *Clawson v. Hutchinson*, 11 S. C. 323.

45 *Bryan v. Doolittle*, 38 Ga. 255, 258.

46 See *Coulon v. Moore*, 9 I. R. C. L. 190; *Wood v. Orford*, 52 Cal. 412; *Bryan v. Doolittle*, 38 Ga. 255, 257; *Rennecker v. Scott*, 4 Greene, 185; *Cannon v. Grantham*, 45 Miss. 88; *Davis v. Wilkinson*, 48 Miss. 585; *Fultz v. Fox*, 9 Mon. B. 499, 509; *Williams v. Kent*, 15 Wend. 360, 362; *Clawson v. Hutchinson*, 11 S. C. 323.

‡ 68. **Conjugal liability in crime.**—A wife is never liable for the crime of her husband, but a husband is liable for all crimes of his wife committed in his presence or with his knowledge and consent.<sup>2</sup> As the case may be, he is liable as principal,<sup>3</sup> or as accessory,<sup>4</sup> and alone<sup>5</sup> or jointly<sup>6</sup> with her. Married women statutes have not changed this liability of his.<sup>7</sup>

1. If it appears only that a criminal act was done by the wife in the presence of her husband, she is deemed to have acted under his coercion,<sup>8</sup> as she is under his power;<sup>9</sup> and he is liable<sup>10</sup> alone.<sup>11</sup> She is in his presence, though he is not in sight, if he is near by and she is acting under his supervision.<sup>12</sup>

2. If it appears that a criminal act was done by the wife in the presence of her husband, but of her own free will, he is jointly liable with her,<sup>13</sup> for it is his right<sup>14</sup> and his duty<sup>15</sup> to prevent her from doing wrong, with force<sup>16</sup> if need be. Probably his *bona fide* endeavors to prevent the act to the extent of his ability would be a defense;<sup>17</sup> of course if he aids and abets her he is liable.<sup>18</sup>

3. If it appears that a criminal act was committed by the wife out of the presence of her husband, but with his concurrence or assent he is liable,<sup>19</sup> just as any one is liable for the acts of his agent.<sup>20</sup>

4. If it appears that a criminal act was committed by the wife out of the presence of her husband, and without his knowledge or assent, he is not liable at all.<sup>21</sup>

But a husband cannot be guilty of conspiring with his wife,<sup>22</sup> unless the conspiracy was consummated before their marriage,<sup>23</sup> or there are other co-conspirators.<sup>24</sup>

1 See *Com. v. Barry*, 115 Mass. 146; 2 Green Cr. R. 285, notes; *post*, CRIMES OF MARRIED WOMEN.

2 See fully *Desty Cr. L.* §§ 15, 16, 17; and other works on criminal law.

3 *Hensly v. State*, 52 Ala. 10, 12; 1 Am. Cr. R. 465.

4 *Reg. v. Manning*, 2 Car. & K. 903. See *State v. Potter*, 42 Vt. 495.

5 *Com. v. Wood*, 97 Mass. 225, 228.

6 *Goldstein v. People*, 82 N. Y. 231, 232.

7 *Com. v. Pratt*, 126 Mass. 462, 463; *Com. v. Wood*, 97 Mass. 225, 229; *Com. v. Barry*, 115 Mass. 146; 2 Green Cr. R. 285, 287, notes.

8 *Hensly v. State*, 52 Ala. 10, 12; 1 Am. Cr. R. 465; see *Desty Cr. L.* § 16 *a*; *Rex v. Hamilton*, 1 Leach, 348; *Edwards v. State*, 27 Ark. 493; *State v. Banks*, 48 Ind. 197; *Marshall v. Oakes*, 51 Me. 308, 309; *Nolan v. Traber*, 49 Md. 460; 33 Am. Rep. 277; *Com. v. Neal*, 10 Mass.



152; 1 Lead. Crim. C. 91; 6 Am. Dec. 105; Com. v. Barry, 115 Mass. 146; 2 Green Cr. R. 285, 287, notes; State v. Bentz, 11 Mo. 27; Haines v. State, 35 N. H. 207; Goldstein v. People, 82 N. Y. 231, 233; State v. Williams, 65 N. C. 399; Davis v. State, 15 Ohio, 72; 45 Am. Dec. 559; City v. Van Roven, 2 McCord, 465; Uhl v. Com. 6 Gratt. 706; State v. Potter, 42 Vt. 495; Miller v. State, 25 Wis. 384.

9 *Ante*, §§ 38, 60.

10 State v. Cleaves, 59 Me. 298, 302; 8 Am. Rep. 422, 490. See Hensley v. State, 52 Ala. 10, 12; 1 Am. Cr. R. 465; Edwards v. State, 27 Ark. 493; 1 Green Cr. R. 741; Com. v. Barry, 2 Green Cr. R. 285, notes.

11 She is liable also in capital cases, see *post*, CRIMES OF MARRIED WOMEN.

12 Com. v. Neal, 10 Mass. 152; 1 Lead. Crim. C. 91; see Reg. v. Boober, 4 Cox C. C. 272; Rex v. Archer, 1 Moody C. C. 143; State v. Nelson, 29 Me. 329; Com. v. Munsey, 112 Mass. 287, 289; State v. Williams, 65 N. C. 398; Davis v. State, 15 Ohio St. 72; State v. Parkerson, 1 Strob. 169; Uhl v. Com. 6 Gratt. 706.

13 State v. Cleaves, 59 Me. 298, 303; 8 Am. Rep. 422, 490; Goldstein v. People, 82 N. Y. 231, 233. See Reg. v. Ingram, 1 Salk. 381; Somerville, 1 And. 101; Phillips, 7 Mon. B. 268; State v. Nelson, 29 Me. 329; Com. v. Tryon, 90 Mass. 442; State v. Bentz, 11 Mo. 27; State v. Parkerson, 1 Strob. 169.

14 *Ante*, §§ 60, 62, 63.

15 Com. v. Wood, 97 Mass. 225, 229; Com. v. Barry, 115 Mass. 146; 2 Green Cr. R. 285, 287.

16 Com. v. Barry, 2 Green Cr. R. 285, 287, notes; *ante*, § 63.

17 See Com. v. Van Stone, 97 Mass. 518; King v. Stapleton, Jebb C. C. 93.

18 Goldstein v. People, 82 N. Y. 231, 233. See Reg. v. Manning, 2 Car. & K. 903; Rex v. Morris, 2 Leach, 1096; Ross v. Com. 2 Mon. B. 417; State v. Brown, 31 Me. 529; Com. v. Nichols, 10 Met. 259; Schmidt v. State, 14 Mo. 137; State v. Dow, 21 Vt. 484.

19 Williamson v. State, 16 Ala. 431, 436.

20 State v. Colby, 55 N. H. 72, 73; State v. Roberts, 55 N. H. 483, 485; *post*, § 89.

21 State v. Baker, 71 Mo. 475, 476. See Com. v. Welch, 97 Mass. 593, 594; Com. v. Munsey, 112 Mass. 287, 289; Handy v. Foley, 121 Mass. 259, 261; 23 Am. Rep. 270.

22 People v. Mather, 4 Wend. 229; 21 Am. Dec. 122; Com. v. Manson, 2 Ashm. 31.

23 Rex v. Robinson, 1 Leach, 37.

24 Rex v. Locker, 5 Esp. 107; Com. v. Wood, 7 Bos. L. R. 58; Com. v. Manson, 2 Ashm. 31.

§ 69. Other personal rights and liabilities. — The husband must generally, except under express statutes, be joined in all suits in which his wife is a party.<sup>1</sup>

1 Brown v. Kemper, 27 Md. 666, 672; *ante*, §§ 66, 67.

§ 70. Property rights and liabilities. — (These are dis-



cussed under the title "Estates of Husband and Wife."<sup>1</sup>)

1 *Post*, §§ 135-330.

§ 71. Rights and obligations as to children.—(These are discussed incidentally in Stewart on Marriage and Divorce.<sup>1</sup>)

1 Stewart M. & D. §§ 400-407.

## ART. II. ACTIONS ARISING FROM CONJUGAL RIGHTS AND OBLIGATIONS.

- § 72. Suits for restitution of conjugal rights.
- § 73. Suits for divorce.
- § 74. Suits for maintenance.
- § 75. Writs of *supplicavit*, etc.
- § 76. Suits of wife in which husband is joined, etc.
- § 77. Suits for wrongs to spouse.
- § 78. Suits for enticement or harboring.
- § 79. Suits for criminal conversation.
- § 80. Suits under civil damage act.
- § 81. Suits for necessities.

§ 72. Suits for restitution of conjugal rights.—If one spouse wrongfully left the other the latter could formerly bring suit in the ecclesiastical courts to compel cohabitation,<sup>1</sup> this was called a suit for the restitution of conjugal rights.<sup>2</sup> Such a suit may still be brought in England,<sup>3</sup> but is unknown in the United States<sup>4</sup> where cohabitation cannot be directly enforced.<sup>5</sup>

1 Orme, 2 Add. Ec. R. 382; 2 Eng. Ec. R. 354, 356.

2 Stewart M. & D. § 175; 1 Bish. M. & D. §§ 171, 172; *ante*, § 59.

3 Firebrace, Law R. 4 P. D. 63.

4 Westlake, 34 Ohio St. 621, 628; discussed cases collected in Stewart M. & D. § 175.

5 Baugh, 37 Mich. 59, 62.

§ 73. Suits for divorce.—(Fully discussed in Stewart on Marriage and Divorce.)

§ 74. **Suits for maintenance.**—In most of the States a wife may proceed against her husband in equity to make him support her.<sup>1</sup>

1 Stewart M. & D. § 179, full discussion.

§ 75. **Writs of supplicavit, etc.**—Under the common law, on the application of a wife who showed herself to be in danger from her husband, a court of equity would grant her a writ, called a writ of *supplicavit*, requiring her husband to give security to treat her properly.<sup>1</sup> This writ is unknown in the United States,<sup>2</sup> where an ordinary bond to keep the peace serves all its purposes.<sup>3</sup> Under statute a wife if deserted by her husband may have a writ for the protection of her earnings from him in case of his return.<sup>4</sup>

1 King v. Lee, 2 Lev. 128; Head, 3 Atk. 547; Clavering, 2 P. Wms. 202; Boynton, Amb. 63; King, 2 Ves. 578; Amb. 333; Heyn, 2 Ves. & B. 182; Dobbyn, 3 Ves. & B. 183; Tuanichiff, 1 Jacob & W. 348; 2 Story Eq. § 1423; 2 Bish. M. & D. § 352.

2 Adams, 100 Mass. 365, 369, 372; 1 Am. Rep. 3; Cold, 2 Johns. Ch. 141, 142.

3 Cold, 2 Johns. Ch. 141, 142.

4 Cargill, 1 Swab. & T. 225; Aldridge, 1 Swab. & T. 88; Thompson, 1 Swab. & T. 251; Mason v. Mitchell, 34 Law J. Ex. 68; Sharp, 33 Law J. M. C. 152; Hall, 27 Law J. M. C. 19.

§ 76. **Suits of wife in which husband is joined and suits of husband by marital right.**—A husband is generally liable to be sued with his wife on her antenuptial contracts,<sup>1</sup> and for her torts,<sup>2</sup> and to be prosecuted with her for her crimes;<sup>3</sup> he usually sues with her on her contracts,<sup>4</sup> and for injuries to her,<sup>5</sup> in fact he is commonly joined with her in all her suits.<sup>6</sup> He is also liable *alone as husband* for her wrongs done in his presence;<sup>7</sup> and has a right to sue *alone* for any infringement of his conjugal rights<sup>8</sup> to her services, society, affection, and fidelity: hence arise rights of action against one who injures his wife,<sup>9</sup> or entices her

or harbors her away from him,<sup>10</sup> or has sexual intercourse with her.<sup>11</sup>

1 Heard v. Stamford, 3 P. Wms. 407, 412; *ante*, § 67.

2 Ferguson v. Collins, 8 Ark. 241, 252; *ante*, § 66.

3 Goldstine v. People, 82 N. Y. 231, 233; *ante*, § 63.

4 Titus v. Ash, 24 N. H. 328; *post*, §§ 176, 183.

5 Craddock v. Goodwin, 54 Tex. 581; *post*, § 176.

6 Hawes Parties, § 63; *post*, §§ 432, 433.

7 Ball v. Bennett, 21 Ind. 427, 428; *ante*, §§ 66, 68.

8 *Ante*, §§ 58, 59, 60, 62, 65.

9 Pollard v. N. J. 101 U. S. 223, 244; *post*, § 77.

10 Burnett v. Burkhead, 21 Ark. 77, 79; *post*, § 78.

11 Norton v. Warner, 9 Conn. 172, 174; *post*, § 79.

§ 77. Suits for wrongs to spouse.—1. Except under some such statute as a civil damage act,<sup>1</sup> a wife has no right of action for injuries to her husband,<sup>2</sup> though she has perhaps a right of action against one who entices him away.<sup>3</sup> But out of an injury to a wife may arise two actions in favor of her husband<sup>4</sup>—one in the right of the wife<sup>5</sup> in which the husband and wife sue jointly for the direct injuries to her,<sup>6</sup> the other in the right of the husband in which the husband sues alone for consequential damages to himself.<sup>7</sup> Thus, where through the neglect of a city a wife was much injured in body she and her husband brought one suit for her suffering, etc., and recovered,<sup>8</sup> and then her husband brought another suit for his expenses arising from her illness, his loss of her society and services, and his own loss of time, and also recovered.<sup>9</sup> Since these suits are in different rights<sup>10</sup> they cannot be joined,<sup>11</sup> though a misjoinder is cured by verdict.<sup>12</sup> The former abates on the death of the wife,<sup>13</sup> survives to her,<sup>14</sup> and belongs to her after absolute divorce;<sup>15</sup> the latter is not affected by divorce,<sup>16</sup> or by the death of the wife,<sup>17</sup> but abates on the death of the husband,<sup>18</sup> except where the right to sue in the former action is by statute given to the

wife alone,<sup>19</sup> the husband may discharge it,<sup>20</sup> controls the suit,<sup>21</sup> and owns the damages.<sup>22</sup> Recovery in one suit is conclusive (*res adjudicata*) as to the right to recover in the other,<sup>23</sup> but no damages can be allowed in the one which are allowable in the other: thus, in the joint suit no recovery can be had for special damage to the husband<sup>24</sup> or for loss of services which were the husband's,<sup>25</sup> and in the sole suit no recovery can be had for the pain and suffering of the wife<sup>26</sup> or for expenditures which she made;<sup>27</sup> and when punitive damages have been allowed in one suit this should be considered in estimating the damages in the other.<sup>28</sup> In the husband's suit he recovers, except in cases of malice,<sup>29</sup> and actions for *crim. con.*,<sup>30</sup> only actual damages<sup>31</sup> for his loss of the services and society of his wife,<sup>32</sup> the expenses to him naturally resulting from the injury to her,<sup>33</sup> the cost of the necessary employment of extra help,<sup>34</sup> and the loss of his own time;<sup>35</sup> but nothing for his distress of mind caused by her suffering,<sup>36</sup> and nothing for her death,<sup>37</sup> except by statute,<sup>38</sup> but only for his loss up to the time of her death.<sup>39</sup> The fact that the parties were at the time of the injury living apart goes only in mitigation of damages.<sup>40</sup>

2. As to particular suits: For slander of the wife, husband and wife sue jointly, if the words are actionable *per se*;<sup>41</sup> but the husband alone if they are not,<sup>42</sup> and always for any special damage;<sup>43</sup> but the fact that words not slanderous *per se* made the wife ill, gives no one a right of action.<sup>44</sup> Husband may sue alone for careless transportation of his wife for which he paid,<sup>45</sup> and jointly with her for failure to transport her.<sup>46</sup> He may alone sue a druggist for secretly selling his wife laudanum to his damage.<sup>47</sup> Separate consideration is given to a husband's suits for enticement<sup>48</sup> and criminal conversation.<sup>49</sup>

For an injury to the wife before marriage husband and wife sue jointly,<sup>50</sup> and the damages, if recovered during coverture, go to the husband.<sup>51</sup>

1. *Post*, § 80.

2 See *Carey v. Berkshire*, 1 Cush. 475, 478; *Logan*, 77 Ind. 538; *Woods v. Coenan*, 41 Iowa, 19.

3 *Post*, § 78.

4 *Brockbank v. Whitehaven*, 7 Hurl. & N. 834, 838; *Hunter v. Ogden*, 31 Up. Can. Q. B. 132, 140; *Pollard v. N. J.* 101 U. S. 223, 244; *Fuller v. Naugatank*, 21 Conn. 557, 571; *Ruder v. Purdy*, 41 Ill. 279, 287; *Long v. Morrison*, 14 Ind. 595, 596; *Anderson*, 11 Bush, 327, 330; *Hooper v. Haskell*, 56 Me. 251, 252; *Laughlin v. Eaton*, 54 Me. 156, 159; *Michigan v. Coleman*, 28 Mich. 440, 442; *Smith v. St. Joseph*, 55 Mo. 456, 458; 17 Am. Rep. 660; *Klein v. Jewett*, 26 N. J. Eq. 474, 480; *Lewis v. Babcock*, 18 Johns. 443, 444; *Crump v. McKay*, 8 Jones, 32, 33; *Whitcomb v. Barre*, 37 Vt. 148, 151; *Lindsey v. Danville*, 46 Vt. 144, 148; *Wheeling v. Trowbridge*, 5 W. Va. 353, 354; *Meese v. Fonddu Lac*, 48 Wis. 323, 328.

5 *Ruder v. Purdy*, 41 Ill. 279, 287; *Michigan v. Coleman*, 28 Mich. 440, 442.

6 *Laughlin v. Eaton*, 54 Me. 156, 158; *Saltmarsh v. Cardin*, 51 N. H. 71, 73; *post*, SUITS OF MARRIED WOMEN.

7 See *Baker v. Bolton*, 1 Camp. 493; *Cross v. Guthery*, 2 Root, 90, 92; 1 Am. Dec. 61; *Fuller v. Naugatank*, 21 Conn. 557, 571; *Ruder v. Purdy*, 41 Ill. 279, 287; *Rogers v. Smith*, 17 Ind. 323; *Long v. Morrison*, 14 Ind. 595, 596; *McKinney v. Western*, 4 Iowa, 420; *Tuttle v. Chicago*, 42 Iowa, 518, 521; *Neumeister v. Dubuque*, 47 Iowa, 465; *Mewhirter v. Halten*, 42 Iowa, 288, 289; *Mowry v. Cheney*, 43 Iowa, 609; *Eden v. Lexington*, 14 Mon. B. 204; *Hooper v. Haskell*, 56 Me. 251, 252; *Barnes v. Hurd*, 11 Mass. 59; *Fillebrown v. Hoar*, 124 Mass. 580, 585; *Berger v. Jacobs*, 21 Mich. 215; *Hyatt v. Adams*, 16 Mich. 180, 193, 196; *Smith v. St. Joseph*, 55 Mo. 456, 458, 459; 17 Am. Rep. 660; *Beach v. Ranney*, 2 Hill, 309, 316; *Hoard v. Peck*, 56 Barb. 202, 206; *Eller v. N. Y.* 49 N. Y. 47; 10 Am. Rep. 327; *Watson v. N. Y.* 35 N. Y. 487; *Phillippi v. Woeff*, 14 Abb. 87; N. S. 196; *Crump v. McKay*, 8 Jones, 32, 34; *Lindsey v. Danville*, 46 Vt. 144, 147; *Meese v. Fonddu Lac*, 48 Wis. 323, 328; *Kavanaugh v. Janesville*, 24 Wis. 618, 621; *Barnes v. Martin*, 15 Wis. 240; *Hunt v. Winfield*, 36 Wis. 154; 17 Am. Rep. 482.

8 *Smith v. St. Joseph*, 45 Mo. 449.

9 *Smith v. St. Joseph*, 55 Mo. 456; 17 Am. Rep. 660.

10 *Ruder v. Purdy*, 41 Ill. 279, 287.

11 *Brockbank v. Whitehaven*, 7 Hurl. & N. 834, 838; *Fuller v. Naugatank*, 21 Conn. 557, 571; *Lewis v. Babcock*, 18 Johns. 443, 444.

12 *Lewis v. Babcock*, 18 Johns. 443, 444.

13 *Nocross v. Stuart*, 50 Me. 87, 89; *Saltmarsh v. Cardin*, 51 N. H. 71, 72; *Stroop v. Swartz*, 12 Serg. & R. 76. Except by statute: *Garrison v. Burden*, 40 Ala. 573; *Earl v. Pupper*, 45 Vt. 275, 283.

14 *Fowler v. Frisbee*, 3 Conn. 320, 324; *Stewart M. & D.* § 465.

15 *Chase*, 6 Gray, 157, 159; *Gibson*, 46 Wis. 449, 458; *Stewart M. & D.* § 448.

16 See *Dickeman v. Graves*, 6 Cush. 308, 309; *Stewart M. & D.* § 448; *post*, § 79.

II. & W. — 10.

17 Hyatt v. Adams, 16 Mich. 166, 180, 193. Full discussion: See Cross v. Guthrey, 2 Root, 90, 92; Long v. Morrison, 14 Ind. 595, 596.

18 Wood v. Matthews, 47 Iowa, 409, 410; Ratcliff v. Wales, 1 Hill, 63. Except by statute: Cregin v. Brooklyn, 56 How. Pr. 32, 465.

19 Michigan v. Coleman, 23 Mich. 440, 442.

20 Long v. Morrison, 14 Ind. 595, 597; Anderson, 11 Bush, 327, 330; Ballard v. Russell, 33 Me. 196, 197; Southworth v. Packard, 7 Mass. 95, 96; Shattuck v. Clifton, 22 Wls. 142.

21 Cases *supra*, n. 20; Coolidge v. Parris, 8 Ohio St. 594, 597.

22 Gibson, 43 Wls. 23, 26; see Ruder v. Purdy, 41 Ill. 279, 287.

23 Lindsey v. Danville, 46 Vt. 144, 147.

24 Wheeling v. Trowbridge, 5 W. Va. 453, 454; *supra*, n. 7.

25 Mewhirter v. Halten, 42 Iowa, 288, 289, 291; 20 Am. Rep. 618; Tuttle v. Chicago, 42 Iowa, 518, 521; *ante*, ‡ 65.

26 Hunter v. Ogden, 31 Up. Can. Q. B. 132, 140; King v. Thompson, 87 Pa. St. 365, 368; 30 Am. Rep. 364; *supra*, notes 4, 5, 6.

27 Walden v. Clark, 50 Vt. 383, 385.

28 Ruder v. Purdy, 41 Ill. 279, 287.

29 See Ruder v. Purdy, 41 Ill. 279, 287; Hyatt v. Adams, 16 Mich. 180, 199.

30 *Post*, ‡ 79.

31 Hyatt v. Adams, 16 Mich. 180, 199.

32 Mewhirter v. Halten, 42 Iowa, 288, 289; 20 Am. Rep. 618; Hyatt v. Adams, 16 Mich. 180, 199; Whitcomb v. Barre, 37 Vt. 148, 152; Lindsey v. Danville, 46 Vt. 144, 148; Kavanaugh v. Janesville, 24 Wls. 618, 621; *supra*, n. 7. He is entitled to them in spite of modern statutes: *Ante*, ‡ 65.

33 Smith v. St. Joseph, 55 Mo. 456, 459; 17 Am. Rep. 660; Lindsey v. Danville, 46 Vt. 144, 150.

34 Lindsey v. Danville, 46 Vt. 144, 149.

35 Smith v. St. Joseph, 55 Mo. 456, 459; 17 Am. Rep. 660; Lindsey v. Danville, 46 Vt. 144, 150.

36 Ellibrown v. Hoar, 124 Mass. 580, 585; Hyatt v. Adams, 16 Mich. 180, 198.

37 Hyatt v. Adams, 16 Mich. 180, 185. See Baker v. Bolton, 1 Camp. 493; Carey v. Berkshire, 1 Cush. 475, 478; Nelson v. Brown, 13 R. I. 651; 43 Am. Rep. 58.

38 Stewart M. & D. ‡ 472. See also cases *post*, ‡ 80.

39 Long v. Morrison, 14 Ind. 595, 596; Hyatt v. Adams, 16 Mich. 180, 193, 196.

40 Ballard v. Russell, 33 Me. 196, 197; Laughlin v. Eaton, 54 Me. 156, 159.

41 Dengate v. Gardiner, 4 Mees. & W. 6, 7; Smalley v. Anderson, 2 Mon. B. 56, 57; Newcomer v. Kean, 57 Md. 121, 122, 125; Beach v. Ranney, 2 Hill, 309, 316. See Davies v. Solomon, Law R. 7 Q. B. 112, 114.

42 Dengate v. Gardiner, 4 Mees. & W. 6, 7; Beach v. Ranney, 2 Hill, 309, 316.

43 Saville v. Sweeney, 4 Barn. & Adol. 514, 522; Ailsop, 2 Law T. N. S. 290, 291; Throgmorton v. Davis, 2 Blackf. 383, 384.

44 Allsop, 2 Law T. N. S. 290; Shafer v. Ahalt, 48 Md. 171, 174; Wilson v. Goit, 17 N. Y. 442, 444; Terwilliger v. Wands, 17 N. Y. 54.

45 Crump v. McKay, 8 Jones, 32, 34.

46 Pollard v. N. J. 101 U. S. 223, 244; Heirn v. McCaughan, 32 Miss. 17, 39.

47 Hord v. Peck, 56 Barb. 292, 206.

48 *Post*, § 78.

49 *Post*, § 79.

50 Hay v. Rogers, 4 Mon. 225, 226. See Kimbro v. First, 1 McAr. 65; Bell v. Allen, 53 Ala. 125; Weagle v. Hensley, 5 Marsh. J. J. 378; Fightmaster v. Beasley, 1 Marsh. J. J. 606; Bratton v. Mitchell, 7 Watts, 115; Armstrong v. Simarton, 2 Murph. 202; Gibson, 43 Wis. 24; *post*, § 183.

51 *Post*, § 183.

§ 78. Suits for enticement or harboring.—1. A husband is entitled to his wife's society,<sup>1</sup> as well as her services,<sup>2</sup> and against any one who by abducting her,<sup>3</sup> or inducing her to leave him,<sup>4</sup> or keeping her separate from him,<sup>5</sup> deprives him of her society and services, he has a right of action.<sup>6</sup> One, whether a parent<sup>7</sup> or a stranger,<sup>8</sup> is liable to the husband for separating his wife from him, so long as such parent or stranger is the moving cause of the separation;<sup>9</sup> if the wife has a ground for divorce against her husband, and a stranger *being consulted by her*,<sup>10</sup> or a parent,<sup>11</sup> advises her to leave him and get a divorce, and acting on such advice she does so, the husband has no right of action, but it is otherwise if a stranger, of his own accord, thus brings about a divorce.<sup>12</sup> And parents are justified in opening their daughter's eyes to the bad character of her husband if they use no misrepresentation or physical or moral force to keep her from him, though they thus cause a final separation between them.<sup>13</sup> Harboring a wife may be justifiable when causing a separation would not be;<sup>14</sup> it is always so if the husband has forfeited his right of cohabitation.<sup>15</sup> Not only a parent<sup>16</sup> or child,<sup>17</sup> but a stranger<sup>18</sup> may give shelter to a wife who has left her husband, but the motives of such harborer

are important, and must not be to separate husband and wife;<sup>19</sup> those of a parent are presumed good.<sup>20</sup> And when in addition to giving shelter there is concealment of the wife,<sup>21</sup> or denial of access to the husband,<sup>22</sup> or inducement of the wife not to return to her husband,<sup>23</sup> the harbinger is liable. Still the husband must, in the case of mere detainer, show demand and refusal.<sup>24</sup> In other respects the right of action is very similar to his right of action for criminal conversation.<sup>25</sup>

2. A wife is entitled to the society of her husband,<sup>26</sup> and when she may sue without her husband for injuries to her,<sup>27</sup> she may sue one who separates her husband from her.<sup>28</sup>

3. The damages awarded in this action should cover the value to the plaintiff<sup>29</sup> of the spouse whose society has been lost,<sup>30</sup> as well as actual pecuniary loss, if any.<sup>31</sup>

1 *Ante*, §§ 59, 62.

2 *Ante*, § 65.

3 See *White v. Ross*, 47 Mich. 172, 176.

4 *Barnes v. Allen*, 30 Barb. 663, 668; 1 Keyes, 390; 1 Abb. App. Dec. 111, 115, 116.

5 *Barbee v. Armstead*, 10 Ired. 530, 531; 51 Am. Dec. 401.

6 *Philip v. Squire*, 1 Peake, 115; *Berthon v. Cartwright*, 2 Esp. 480; *Winsmore v. Greenback*, Willes, 577, 581; *Burnett v. Burkhead*, 21 Ark. 77, 79; *Wood v. Matthews*, 47 Iowa, 409, 410; *Hadley v. Heywood*, 121 Mass. 236, 239; *Turner v. Estes*, 3 Mass. 317, 318; *White v. Ross*, 47 Mich. 172, 176; *Modisett v. McPike*, 74 Mo. 636, 647; *Barnes v. Allen*, 30 Barb. 663, 668; 1 Keyes, 390; 1 Abb. App. Dec. 111, 115, 116; *Schoeneman v. Palmer*, 4 Barb. 225, 226, 227; *Bennett v. Smith*, 21 Barb. 439, 441; *Hutcheson v. Peck*, 5 Johns. 196, 205; *Smith v. Lyke*, 20 N. Y. Supr. 204, 205; *Barbee v. Armstead*, 10 Ired. 530, 531; 51 Am. Dec. 401; *Friend v. Thompson*, Wright, 636, 638; *Rabe v. Hanna*, 5 Ohio, 530, 531; *Payne v. Williams*, 4 Baxt. 583, 585. Consult cases *post*, § 79. But see *Neilson v. Brown*, 13 R. I. 651; 43 Am. Rep. 58.

7 *Hutcheson v. Peck*, 5 Johns. 196, 202, 204.

8 *Bennett v. Smith*, 21 Barb. 439, 441.

9 *Hadley v. Heywood*, 121 Mass. 236, 239; *supra*, n. 6.

10 *Modisett v. McPike*, 74 Mo. 636, 646.

11 *White v. Ross*, 47 Mich. 172, 176; *Modisett v. McPike*, 74 Mo. 636, 517.

12 *Modisett v. McPike*, 74 Mo. 636, 646, 647.

13 *White v. Ross*, 47 Mich. 172, 176; *Bennett v. Smith*, 21 Barb. 439, 445; *Payne v. Williams*, 4 Baxt. 583, 585.

14 *Barnes v. Allen*, 30 Barb. 663, 668.



15 *Berthon v. Cartwright*, 2 Esp. 480; *Barnes v. Allen*, 30 Barb. 663, 668; 1 Abb. App. Dec. 111, 116.

16 *Burnett v. Burkhead*, 21 Ark. 77, 79; *Friend v. Thompson, Wright*, 636, 638; *Rabe v. Hanna*, 5 Ohio, 530, 531.

17 *Turner v. Estes*, 3 Mass. 317, 318.

18 *Philp v. Squire*, 1 Peake, 115; *Hutcheson v. Peck*, 5 Johns. 196, 204.

19 *Hutcheson v. Peck*, 5 Johns. 196, 205; *Barnes v. Allen*, 1 Abb. App. Dec. 111, 118; *Friend v. Thompson, Wright*, 636, 638; cases *supra*, n. 6.

20 *Burnett v. Burkhead*, 21 Ark. 77, 79; *Hutcheson v. Peck*, 5 Johns. 196, 210; *Rabe v. Hanna*, 5 Ohio, 530, 531. See *White v. Ross*, 47 Mich. 172, 176.

21 *Turner v. Estes*, 3 Mass. 317, 318.

22 See *Barbee v. Armstead*, 10 Ired. 530, 533; 51 Am. Dec. 404.

23 See *Winsmore v. Greenbank, Willes*, 580; *Bennett v. Smith*, 21 Barb. 439, 442.

24 See *Winsmore v. Greenbank, Willes*, 577, 581; *Barbee v. Armstead*, 10 Ired. 530, 533; 51 Am. Dec. 404.

25 *Post*, § 79. See *Perry v. Lovejoy*, 49 Mich. 529.

26 *Lynch v. Knight*, 9 H. L. Cas. 577, 583; *ante*, § 59.

27 *Van Arnham v. Ayers*, 67 Barb. 544, 548; *post*, §

23 See *Lynch v. Knight*, 9 H. L. Cas. 577, 589; *Davies v. Solomon* Law R. 7 Q. B. 112, 114; *Van Arnham v. Ayers*, 67 Barb. 544, 548; *Breiman v. Pusch*, 7 Abb. N. C. 249, 252; *Clark v. Harlan*, 1 Cin. 418, 422; *Westlake*, 34 Ohio St. 621, 628; 32 Am. Rep. 397; 19 Abb. L. J. 494; 8 Cent. L. J. 473.

29 *Payne v. Williams*, 4 Baxt. 583, 586; *post*, § 79.

30 *Cowing*, 33 Law J. Prob. 149, 150; *Ferguson v. Smethers*, 70 Ind. 519, 521; 36 Am. Rep. 186; *Payne v. Williams*, 4 Baxt. 583, 586; *post*, § 79.

31 *Ante*, § 78; *post*, § 79.

§ 79. **Suits for criminal conversation.**—A husband has besides his right to his wife's society<sup>1</sup> and services,<sup>2</sup> the exclusive right of sexual intercourse with her,<sup>3</sup> a right on the preservation of which depends the honor and comfort of his home, and the certainty that her offspring are his children,<sup>4</sup> and he has a right of action against any one who commits adultery with her.<sup>5</sup>

1. The action is either trespass or case;<sup>6</sup> but under statute it may form a part of a divorce suit for adultery, the complaining husband making his wife's paramour correspondent with her and asking for damages from him.<sup>7</sup> It is in the nature of a personal suit,<sup>8</sup> and dies

with the husband,<sup>9</sup> but it is not affected by divorce,<sup>10</sup> or by the death of the wife.<sup>11</sup> The gist of the action is the adultery or criminal conversation,<sup>12</sup> and the right depends on the existence of an actual marriage between the plaintiff and the woman at the time of the adultery.<sup>13</sup>

2. The declaration should allege the marriage,<sup>14</sup> and the adultery;<sup>15</sup> but the latter need not be so specifically alleged<sup>16</sup> as in divorce cases;<sup>17</sup> counts for loss of services,<sup>18</sup> and for loss of society<sup>19</sup> may be joined, but proof of neither is necessary to support the suit.<sup>20</sup> The sole defense seems to be that the plaintiff consented to his wife's adultery with the defendant,<sup>21</sup> or consented to her living as a prostitute<sup>22</sup>—it is no defense that the plaintiff was living apart from his wife before the adultery complained of,<sup>23</sup> or continued living with her thereafter,<sup>24</sup> and after he knew of it;<sup>25</sup> or that his wife was unchaste<sup>26</sup> before<sup>27</sup> or after<sup>28</sup> her marriage with him; or that he was unchaste;<sup>29</sup> or that he treated her badly,<sup>30</sup> or was simply careless of her mode of life;<sup>31</sup> or that she readily consented to commit the adultery,<sup>32</sup> though all these facts may be proved without allegation in mitigation of damages.<sup>33</sup> Nor is it a defense that the adultery was a crime—rape.<sup>34</sup>

3. Strict proof of marriage is required;<sup>35</sup> adultery is proved as in divorce cases.<sup>36</sup> Confessions of the wife are not evidence against,<sup>37</sup> or her declarations evidence for,<sup>38</sup> the defendant, unless they are a part of the *res geste*;<sup>39</sup> but the defendant's confessions are evidence.<sup>40</sup> The wife cannot generally testify at all.<sup>41</sup>

4. The damages allowed in suits for criminal conversation are penal rather than compensatory,<sup>42</sup> for the plaintiff is entitled to substantial damages though he prove no resulting expense or loss of society or services.<sup>43</sup> They are often exemplary,<sup>44</sup> and courts will

rarely set aside a verdict for excess.<sup>45</sup> The jury considers the value of the wife,<sup>46</sup> her previous want of chastity,<sup>47</sup> her easy fall,<sup>48</sup> and how far it was caused by the plaintiff's disregard of his marriage obligations;<sup>49</sup> the extent of the plaintiff's loss,<sup>50</sup> how much he saw of her,<sup>51</sup> and cared for her:<sup>52</sup> the shock to his feelings,<sup>53</sup> the dishonor of his bed,<sup>54</sup> the doubts cast on the pedigree of his children,<sup>55</sup> the loss of his wife's comfort and assistance,<sup>56</sup> her resulting unfitness for domestic duties;<sup>57</sup> the defendant's conduct, whether sudden or deliberate;<sup>58</sup> the defendant's wealth, if he used it to seduce the wife,<sup>59</sup> to enhance damages,<sup>60</sup> but not his poverty to diminish them.<sup>61</sup> The jury cannot consider the injury to the honor, reputation, and happiness of the plaintiff's family.<sup>62</sup>

1 *Ante*, §§ 53, 62, 78.

2 *Ante*, §§ 65, 77.

3 *Ante*, § 59.

4 *Yundt v. Hartranft*, 41 Ill. 9, 17.

6 *Cowing*, 33 Law J. Prob. 149, 150; *Colcraft v. Harborough*, 4 Car. & P. 490, 501; *Winter v. Henn*, 4 Car. & P. 494, 498; *Wilton v. Webster*, 7 Car. & P. 198; *Duberly v. Gunning*, 4 Term, 657; *Chamberlain v. Hazlewood*, 5 Mees. & W. 515, 517; *Davenport v. Russell*, 5 Day, 145, 149; *Norton v. Warner*, 9 Conn. 172, 174; *Cook v. Wood*, 30 Ga. 891, 893; *Peters v. Lake*, 66 Ill. 206; 16 Am. Rep. 593; *Rea v. Tucker*, 51 Ill. 110, 111; *Yundt v. Hartranft*, 41 Ill. 9, 12; *Van Vachter v. McKillip*, 7 Blackf. 589; *McVey v. Blair*, 7 Ind. 590, 592; *Dallas v. Sellers*, 17 Ind. 479, 480; *Harrison v. Price*, 22 Ind. 165, 166; *Underwood v. Linton*, 54 Ind. 468, 469; *Coleman v. White*, 59 Ind. 548, 551; *Ferguson v. Smethers*, 70 Ind. 519, 521; 36 Am. Rep. 186; *Verholf v. Van Honwenlengen*, 21 Iowa, 429, 432; *Stumm v. Hummel*, 39 Iowa, 478, 480; *Conway v. Nicoll*, 34 Iowa, 533, 536; *Dance v. McBride*, 43 Iowa, 624, 629; *Wood v. Matthews*, 47 Iowa, 404, 411; *Kibby v. Rucker*, 1 Marsh. A. K. 391; *Palmer v. Crook*, 7 Gray, 418; *Dickerman v. Graves*, 6 Cush. 308; 53 Am. Dec. 41; *Pierce*, 3 Pick. 299; 15 Am. Dec. 210; *Hadley v. Heywood*, 121 Mass. 236, 239; *Hutchins v. Kimmell*, 31 Mich. 126; 18 Am. Rep. 164; *Johnston v. Disbrow*, 47 Mich. 59; *Egbert v. Greenwalt*, 44 Mich. 245, 247; 38 Am. Rep. 260; *Sanborn v. Neilson*, 4 N. H. 501, 510; *Foulks v. Archer*, 31 N. J. L. 58, 60; *Harter v. Crill*, 33 Barb. 283, 285; *Ratcliff v. Wales*, 1 Hill, 63; *Bunnell v. Greshend*, 49 Barb. 106, 107; *Train v. Boyer*, 24 Barb. 614; *Preston v. Bowers*, 13 Ohio St. 1, 12; *Sherwood v. Titman*, 55 Pa. St. 77, 79; *Fry v. Derstler*, 2 Yeates, 278, 279; *Forney v. Hallacher*, 8 Serg. & R. 159, 160; 1 Am. Dec. 590; *Torre v. Summers*, 2 Nott & McC. 267, 271; *Blunt v. Little*, 3 Mason, 102, 106; *Shattuck v. Hammond*, 46 Vt. 466, 469; 14 Am. Rep. 631.

6 *Chamberlain v. Hazlewood*, 5 Mees. & W. 515, 517; *Yundt v. Hartranft*, 41 Ill. 9, 17; *Van Vachter v. McKillip*, 7 Blackf. 578, 580; 15 Am. Law Reg. N. S. 449.

7 See *Conradi*, L. R. 1 Pro. & D. 63; 35 Law J. M. C. 49; *West*, Law R. 2 Pro. & D. 196; 40 L. J. M. C. 11; *Underhill Torts*, rule 32.

8 *Garrison v. Burden*, 40 Ala. 513.

9 *Yundt v. Hartranft*, 41 Ill. 912.

10 *Michel v. Dunkle*, 84 Ind. 544; 43<sup>d</sup> Am. Rep. 100; *Wood v. Matthews*, 47 Iowa, 409, 411; *Dickerman v. Graves*, 6 Cush. 308; *Ratcliff v. Waies*, 1 Hill, 63.

11 *Yundt v. Hartranft*, 41 Ill. 9, 12.

12 *Wood v. Matthews*, 47 Iowa, 409, 410. See *Wilton v. Webster*, 7 Car. & P. 198.

13 *Morris v. Miller*, 4 Burr. 2057, 2059; *Birt v. Barlow*, Doug. 171, 174; *Kibby v. Rucker*, 1 Marsh. A. K. 391; *Hutchins v. Kimmell*, 31 Mich. 126; 18 Am. Rep. 164; *Dan v. Kingdom*, 1 Thomp. & C. 492; *Forney v. Hallacher*, 8 Serg. & R. 159, 160.

14 *Hauck v. Grantham*, 22 Ind. 53.

15 See *Stumm v. Hummel*, 39 Iowa, 478, 480.

16 See 15 Am. Law Reg. N. S. 449.

17 *Stewart M. & D.* § 244.

18 See *Yundt v. Hartranft*, 41 Ill. 9, 13; *ante*, § 77.

19 *Ante*, § 78.

20 *Wilton v. Webster*, 7 Car. & P. 198; *Yundt v. Hartranft*, 41 Ill. 9, 17; *Bigauquette v. Paulet*, 134 Mass. 123; 45 Am. Rep. 307.

21 *Duberly v. Gunning*, 4 Term. 651, 652; *Norton v. Warner*, 9 Conn. 172, 174; *Stumm v. Hummel*, 39 Iowa, 478, 482; *Sanborn v. Neilson*, 4 N. H. 501, 511; *Bunnell v. Greathead*, 49 Barb. 106, 107; *Sherwood v. Titman*, 65 Pa. St. 77, 80, 81.

22 *Cook v. Wood*, 30 Ga. 891, 893; *Sanborn v. Neilson*, 4 N. H. 501, 510; *Bunnell v. Greathead*, 49 Barb. 106, 107.

23 *Yundt v. Hartranft*, 41 Ill. 10, 17; *Michel v. Dunkle*, 84 Ind. 544; 43 Am. Rep. 100. But see *Sherman v. Titman*, 55 Pa. St. 77, 79; *Fry v. Derstler*, 2 Yeates, 278, 279.

24 *Wilton v. Webster*, 7 Car. & P. 198; *Stumm v. Hummel*, 39 Iowa, 478, 483; *infra*, n. 25.

25 *Verhoff v. Van Houwenlengen*, 21 Iowa, 429, 432. See *Clouser v. Clapper*, 59 Ind. 548, 552; *Stumm v. Hummel*, 39 Iowa, 478, 483; *Sanborn v. Neilson*, 4 N. H. 501, 510.

26 *Elsam v. Faucett*, 2 Esp. 562, 563; *Winter v. Henn*, 4 Car. & P. 494, 498; *Norton v. Warner*, 9 Conn. 171, 174; *Rea v. Tucker*, 51 Ill. 110, 111; *Clouser v. Clapper*, 59 Ind. 548, 551; *Ferguson v. Smethers*, 70 Ind. 519, 521; 36 Am. Rep. 186; *Conway v. Nicoll*, 34 Iowa, 533, 536; *Harrison v. Price*, 22 Ind. 165, 166; *Sanborn v. Neilson*, 4 N. H. 501, 510; *Foulks v. Archer*, 31 N. J. L. 58, 60; *Gardner v. Maderla*, 2 Yeates, 466; *Torre v. Summers*, 2 Nott & McC. 267, 271; 10 Am. Dec. 597.

27 *Conway v. Nicoll*, 34 Iowa, 533, 536; *supra*, n. 26.

28 *Winter v. Henn*, 4 Car. & P. 494, 498; *supra*, n. 26.

29 *Norton v. Warner*, 9 Conn. 172, 174; *Rea v. Tucker*, 51 Ill. 110, 111; *Harrison v. Price*, 22 Ind. 165, 166; *Sanborn v. Neilson*, 4 N. H. 501, 510; *Shattock v. Hammond*, 46 Vt. 466, 469; 14 Am. Rep. 631.

30 *Norton v. Warner*, 9 Conn. 172, 174; *Coleman v. White*, 43 Ind. 429, 430; *Palmer v. Crook*, 7 Gray, 418.

31 *Duberly v. Gunning*, 4 Term. 657; *Jones v. Sparrow*, 5 Term. 257; *Winter v. Henn*, 4 Car. & P. 494, 499; *Colcraft v. Harborough*, 4 Car.

& P. 499, 501; *Blunt v. Little*, 3 Mason, 102, 103; *Van Vachter v. McKillip*, 7 Blackf. 589, 590; *Pierce*, 3 Pick. 299; 15 Am. Dec. 210; *Sanborn v. Neilson*, 4 N. H. 501, 510.

32 *Elsam v. Faucett*, 2 Esp. 362; *Ferguson v. Smethers*, 70 Ind. 519, 521; 36 Am. Rep. 186; *Bigaonette v. Paulet*, 134 Mass. 123; 45 Am. Rep. 307.

33 See cases cited *supra*, notes 23-32; *Harrison v. Price*, 22 Ind. 165, 166; *Verholf v. Van Houwenlengen*, 21 Iowa, 429, 433; *infra*, notes 47-61.

34 *Egbert v. Greenwalt*, 44 Mich. 245, 247; 38 Am. Rep. 260.

35 *Stewart M. & D.* § 135; *supra*, n. 13.

36 *Stewart M. & D.* §§ 245-247, 344-357.

37 *McVey v. Blair*, 7 Ind. 590, 592; *Underwood v. Linton*, 54 Ind. 468, 469.

38 *Harris v. Rupel*, 14 Ind. 209.

39 See *Bennett v. Smith*, 21 Barb. 439, 416; *Barnes v. Allen*, 1 Abb. App. Dec. 111, 116; *Preston v. Bowers*, 13 Ohio St. 1, 12.

40 *Sanborn v. Neilson*, 4 N. H. 501, 508.

41 *Ante*, § 56.

42 *Yundt v. Hartranft*, 41 Ill. 9, is the leading case.

43 *Yundt v. Hartranft*, 41 Ill. 9, 12, 13, 17; *Stumm v. Hummel*, 39 Iowa, 478, 480; *Wilton v. Webster*, 7 Car. & P. 198.

44 *Peters v. Lake*, 66 Ill. 206; 16 Am. Rep. 593.

45 *Duherly v. Gunning*, 4 Term, 651, 655, 656; *Johnston v. Disbrow*, 47 Mich. 59; *Torre v. Summers*, 2 Nott & McC. 267, 271; 10 Am. Dec. 597.

46 2 Sedg. Dam. 517, note; *Cowing*, 33 Law J. Prob. 149, 150; *Winter v. Henn*, 4 Car. & P. 494, 498; *Ferguson v. Smethers*, 70 Ind. 519, 520, 521; 36 Am. Rep. 186.

47 *Conway v. Nicoll*, 34 Iowa, 533, 536; *supra*, notes 26, 27, 28.

48 *Ferguson v. Smethers*, 70 Ind. 519, 521; 36 Am. Rep. 156.

49 *Coleman v. White*, 43 Ind. 429, 430; *supra*, notes 30, 31.

50 *Bromley v. Wallace*, 4 Esp. 237, 238. See *Payne v. Williams*, 4 Baxt. 583, 586.

51 *Colcraft v. Harborough*, 4 Car. & P. 499, 501. But see *Dallas v. Sellers*, 17 Ind. 479.

52 *Bromley v. Wallace*, 4 Esp. 237, 238; *Harter v. Crill*, 33 Barb. 283, 285.

53 *Johnston v. Disbrow*, 47 Mich. 59.

54 *Yundt v. Hartranft*, 41 Ill. 10, 12, 17; *Wilton v. Webster*, 7 Car. & P. 198.

55 *Yundt v. Hartranft*, 41 Ill. 10, 12, 17.

56 *Yundt v. Hartranft*, 41 Ill. 10, 18.

57 *Davenport v. Russell*, 5 Day, 145, 149.

58 *Stumm v. Hummel*, 39 Iowa, 478, 480.

59 *Cowing*, 33 Law J. Prob. 149, 150; *Wilson v. Leonard*, 5 Ir. Jur. (O. S.) 1 Exch. 96.

60 *Peters v. Lake*, 66 Ill. 206; *Rea v. Tucker*, 51 Ill. 110, 111.

61 *James v. Biddington*, 6 Car. & P. 589.

62 *Ferguson v. Smethers*, 70 Ind. 519, 521; 36 Am. Rep. 186.

§ 80. **Suits under civil damage acts.**—In many States there are statutes which give a right of action to any one who is injured in person, property, or means of support<sup>1</sup> by the drunkenness of another, against the liquor seller who supplies such other with drink; and under such statutes a husband has a right of action for loss of the wife's services,<sup>2</sup> and a wife for loss of the husband's support,<sup>3</sup> caused by intoxication, and may recover actual<sup>4</sup> and in certain cases exemplary damages.<sup>5</sup> Such suits are unknown independently of statute.<sup>6</sup>

1 Kellerman v. Arnold, 71 Ill. 632; Jackson v. Noble, 54 Iowa, 641; Moran v. Goodwin, 130 Mass. 158; 39 Am. Rep. 443; Mead v. Stratton, 87 N. Y. 443; 41 Am. Rep. 386; Volans v. Owen, 74 N. Y. 526; 30 Am. Rep. 337.

2 Welch v. Jugenheimer, 56 Iowa, 11; Moran v. Goodwin, 130 Mass. 158; 39 Am. Rep. 443.

3 Shroder v. Crawford, 94 Ill. 357; Hall v. Barnes, 82 Ill. 228; Kellerman v. Arnold, 71 Ill. 632; Neuerberg v. Gaultier, 4 Ill. App. 348; Schafer v. Smith, 63 Ind. 226; Mitchell v. Ratts, 57 Ind. 259; Richmond v. Shickler, 57 Iowa, 486; Jackson v. Noble, 54 Iowa, 641; Macleod v. Geyer, 53 Iowa, 615; Loan v. Hiney, 53 Iowa, 89; Weitz v. Ewen, 50 Iowa, 34; Werner v. Edmlston, 24 Kan. 147; Gilmore v. Matthews, 67 Me. 517; Barrett v. Dolan, 130 Mass. 366; 39 Am. Rep. 456; Brooks v. Cook, 44 Mich. 617; 38 Am. Rep. 282; Steele v. Thompson, 39 Mich. 733; 37 Mich. 25; Roose v. Perkins, 9 Neb. 304; 31 Am. Rep. 409; Mead v. Stratton, 87 N. Y. 493; 41 Am. Rep. 386; Hill v. Berry, 75 N. Y. 225; Volans v. Owen, 74 N. Y. 526; 30 Am. Rep. 337; Davis v. Standish, 26 Hun, 608; Beam v. Green, 33 Ohio St. 444.

4 Schafer v. Smith, 63 Ind. 226; Roose v. Perkins, 9 Neb. 304.

5 Kellerman v. Arnold, 71 Ill. 632; Weitz v. Ewen, 50 Iowa, 34; Richmond v. Shickler, 57 Iowa 486; Steele v. Thompson, 42 Mich. 594; Davis v. Standish, 26 Hun, 608.

6 Woods v. Coenan, 44 Iowa, 19.

§ 81. **Suits for necessities.**—Suits against a husband by a party who, at the request of the wife and on the credit of the husband, has furnished supplies or performed services, are commonly called "suits for necessities." They are of two kinds: (1) Those in which the right of action is based on the wife's *agency in law* to pledge her husband's credit for the support which he owes<sup>1</sup> but denies—considered in Stewart on Marriage

and Divorce ;" (2) those in which the right of action is based on the wife's *agency in fact* to make purchases or engage services for her husband's house and family—considered hereafter under agency of wife for husband.<sup>3</sup>

1 *Ante*, § 64.

2 Stewart M. & D. § 180.

3 *Post*, §§ 84-98.

## CHAPTER V.

### CONJUGAL AGENCY.

ART. I. AGENCY BETWEEN HUSBAND AND WIFE IN GENERAL, §§ 82, 83.

II. AGENCY OF HUSBAND FOR WIFE, §§ 84-88.

III. AGENCY OF WIFE FOR HUSBAND, §§ 89-98.

ARTICLE I.—AGENCY BETWEEN HUSBAND AND WIFE IN GENERAL.

§ 82. In law and in fact.

§ 83. Division of the subject.

§ 82. Agency between husband and wife in law and in fact.—An agent is a person whose act on behalf of another, called the principal, is duly authorized.<sup>1</sup> Such authority may be derived from the law, and an *agency in law* is thus created; or from the principal, in which case an *agency in fact* is constituted.<sup>2</sup> All acts which one spouse may do for the other because they are husband and wife are done by virtue of an agency in law; for all other acts which one spouse may do for the other there must exist such others prior mandate, contemporaneous assent, or subsequent ratification—an agency in fact.<sup>3</sup>

1. *In law.* A logical application of the common-law fiction that husband and wife are one<sup>4</sup> would make all the acts of one in law the acts of the other, but as the wife's normal status is one of lost identity<sup>5</sup> and legal disability,<sup>6</sup> her acts are not legally acts at all, and bind no one; only when the husband's disregard of his conjugal obligations renders her condition abnormal has she any authority in law to act for him—as when he refuses to support her and she pledges his credit,<sup>7</sup> or



deserts her and she sells his chattels for her sustenance.<sup>8</sup> On the other hand, the husband does at common law cover and stand in the place of his wife;<sup>9</sup> he may, for example, release an antenuptial debt due to her,<sup>10</sup> or their joint right of action for a tort to her;<sup>11</sup> notice to him may be notice to her;<sup>12</sup> and even such of her property as does not pass to him absolutely is, while he is her husband, within his possession and control.<sup>13</sup> Besides this common-law agency of the husband, statutes in some States give him some authority to deal with his wife's separate property,<sup>14</sup> as in Mississippi, where he may buy supplies for his wife's plantation for which she must pay.<sup>15</sup>

2. *In fact.* There is nothing in the marriage relation to prevent one spouse from being agent for the other,<sup>16</sup> though the unity of husband and wife may render void a contract between them for compensation;<sup>17</sup> and therefore whatever a husband can do through any agent he can do through his wife,<sup>18</sup> and a wife who may act by agent at all may act by her husband as her agent.<sup>19</sup> In some States statutes prohibit, to some extent, agency between husband and wife.<sup>20</sup>

1 Ewell's Evans Agency, p. 1.

2 See works on Agency, and cases cited *infra*.

3 McLaren v. Hall, 26 Iowa, 297, 305; Antwood v. Meredith, 37 Miss. 635, 641; Debenham v. Mellon, Law R. 5 Q. B. 394, 402.

4 *Ante*, § 38.

5 O'Ferrall v. Simplot, 4 Iowa, 381, 389; *ante*, § 38; *post*, § 330.

6 *Post*. STATUS OF MARRIED WOMEN, §§ 331-339.

7 Stewart M. & D. § 180; *ante*, §§ 64, 81.

8 Ahern v. Easterby, 42 Conn. 546, 550; Stewart M. & D. §§ 174, 177; *post*, § 90.

9 Winehrinner v. Welsiger, 3 Mon. 32, 34; Burleigh v. Coffin, 22 N. H. 118, 124; *ante*, § 38.

10 Mobley v. Leophart, 47 Ala. 257, 261; *post*, § 176.

11 Ballard v. Russell, 33 Me. 196, 197; 54 Am. Dec. 620; *ante*, § 77.

12 Chew v. Henrietta, 1 McCrary, 222, 226; White v. King, 53 Ala. 162, 167; Railroad v. Brooks, 81 Ill. 293; Moore v. Wade, 8 Kan. 380; Jarden v. Pumphrey, 36 Md. 361, 364; Treadwell v. Hernden, 47 Miss. 46; Hess v. Cole, 23 N. J. L. 116; Leavitt v. Griger, 1 Palge, H. & W. - 11.

421, 422; *McCullough v. Wilson*, 21 Pa. St. 436, 441; *Pringle v. Dunn*, 37 Wis. 449; 19 Am. Rep. 772.

13 *Post*, §§ 141-183.

14 See *Baker v. Flournoy*, 53 Ala. 650; *Marke v. Cowles*, 53 Ala. 409; *Sampley v. Watson*, 43 Ala. 377; *O'Brien v. Foreman*, 46 Cal. 80, 81; *Lawrence v. Sinnamon*, 24 Iowa, 80; *Holman v. Gillette*, 24 Mich. 414; *Clopton v. Matheney*, 48 Miss. 498; *Cook v. Ligon*, 54 Miss. 368, 373; *Antwood v. Meredith*, 37 Miss. 635, 641.

15 *Cook v. Ligon*, 54 Miss. 368, 373, 375.

16 *Glover v. Alcott*, 11 Mich. 481, 492, 493.

17 *Abbey v. Deyo*, 44 Barb. 374, 380; *ante*, §§ 41-43; *post*, § 87.

18 *McGregor v. Sibley*, 63 Pa. St. 388; *post*, §§ 89-98.

19 *Wells v. Smith*, 51 Ga. 262, 263; *post*, §§ 84-88.

20 *Sanford v. Johnson*, 24 Minn. 172, 173.

§ 83. Agency between husband and wife—Subject divided.—A husband's agency for his wife, and a wife's agency for her husband, in law and in fact, must be considered. But this chapter deals mainly with agency in fact of husband<sup>1</sup> and of wife;<sup>2</sup> the wife's agency in law arises only where the husband has disregarded or neglected some marriage obligation, and is treated in *Stewart on Marriage and Divorce*,<sup>3</sup> and the husband's agency in law is discussed under his marriage rights over her person<sup>4</sup> and property.<sup>5</sup>

1 *Post*, §§ 84-88.

2 *Post*, §§ 89-98.

3 *Stewart M. & D.* §§ 171, 177, 180, 389.

4 *Ante*, §§ 57-71.

5 *Post*, §§ 141-183.

## ARTICLE II.—AGENCY OF HUSBAND FOR WIFE.

§ 84. Appointment of husband.

§ 85. Scope of authority of husband.

§ 86. Proof of husband's agency in fact.

§ 87. Compensation of husband.

§ 88. Effect of fraud.

§ 89. Special instances and illustrations.

§ 84. Appointment of husband as agent for wife.—A husband may act in place of his wife either by her authorization or by authority of law.<sup>1</sup>

1. *As her agent in law* he acts simply by virtue of his rights over her person<sup>2</sup> and property,<sup>3</sup> and his authority is co-determinate with these rights.<sup>4</sup> Thus, he may sue for her earnings,<sup>5</sup> because he is entitled to them by law;<sup>6</sup> and for the same reason at common law his receipt for a legacy to her was valid.<sup>7</sup>

2. *As her agent in fact* he must have her prior authority, contemporaneous assent or subsequent ratification,<sup>8</sup> his agency may be revoked<sup>9</sup> and is revoked by her death.<sup>10</sup> And except in the exercise of certain powers,<sup>11</sup> whatever a married woman can do herself she can do through an agent,<sup>12</sup> and whatever she can do through an agent she can do through her husband;<sup>13</sup> but she cannot accomplish by agent what she could not do in person.<sup>14</sup> Her authority may be given in the usual modes, by power of attorney,<sup>15</sup> by parol,<sup>16</sup> or by conduct;<sup>17</sup> whether it was given is a mere question of fact.<sup>18</sup> If she allows her husband to use her property as his own, she is bound by his dealing with it,<sup>19</sup> but not if he holds it wrongfully.<sup>20</sup> If without objecting she sees her rents paid to him,<sup>21</sup> or sees him sell her chattels,<sup>22</sup> she is bound by estoppel;<sup>23</sup> but she cannot be bound by estoppel where she could not have been bound directly.<sup>24</sup> If she accepts improvements on her property ordered by her husband,<sup>25</sup> or a deed made to her at his request,<sup>26</sup> she is bound; so if she assents to his sale<sup>27</sup> or mortgage<sup>28</sup> of her personal property, but she cannot ratify what she could not have authorized,<sup>29</sup> and her mere silence is not ratification<sup>30</sup>—this is a question of fact.<sup>31</sup> Thus, if a wife authorizes her husband to sell her land and there is no fraud on him,<sup>32</sup> or collusion between him and the grantee,<sup>33</sup> and she duly executes the deed, she cannot attack it on the ground of her husband's fraud on her;<sup>34</sup> nor, having authorized her husband to sell, can she attack the sale

on the ground that he has violated her private instructions.<sup>35</sup> She may employ him as her clerk<sup>36</sup> the master of her vessel,<sup>37</sup> her ostler,<sup>38</sup> the collector of her rents,<sup>39</sup> the cultivator of her farm,<sup>40</sup> the general manager of her separate property<sup>41</sup> or separate business;<sup>42</sup> she may make him her special agent to sell,<sup>43</sup> to buy,<sup>44</sup> to exchange,<sup>45</sup> to build;<sup>46</sup> and in such cases she is entitled to the benefits,<sup>47</sup> and bound for the liabilities<sup>48</sup> resulting from his acts, whether with respect to himself,<sup>49</sup> or to third parties.<sup>50</sup> So she may be liable for his tort as her agent.<sup>51</sup> And his admissions may be evidence against her.<sup>52</sup>

1 *Ante*, § 82.

2 *Ante*, §§ 57-81.

3 See *post*, §§ 141-183.

4 *Post*, § 85. He may accept a deed for her: *McGehee v. White*, 31 Miss. 41, 46; or elect for her, see *Chadbourne v. Rockcliff*, 30 Me. 354, 361; *Shallenberger v. Ashworth*, 25 Pa. St. 152, 153; *Owen v. Hancock*, 1 Head, 563; *Danbridge v. Minge*, 4 Rand. 397, 403.

5 *Cranor v. Winters*, 75 Ind. 301, 303; *ante*, § 65.

6 Fully, *ante*, § 65.

7 *Mobley v. Leophart*, 47 Ala. 257, 261; *post*, § 176.

8 *Lichtenberger v. Graham*, 50 Ind. 288, 290; *McLaren v. Hall*, 26 Iowa, 297, 305; *Antwood v. Meredith*, 37 Miss. 635; 641; *post*, § 85.

9 *Lyon v. Green*, 42 Wis. 548, 554.

10 *Cunningham*, Myr. Prob. 76.

11 *Rogers v. Brooks*, 30 Ark. 612, 628; *Whitescamer v. Bonner*, 9 Iowa, 484; *post*, § 390.

12 *Vail v. Meyer*, 71 Ind. 159, 165; *Allen v. Johnson*, 48 Miss. 418; *Abbey v. Deyo*, 44 Barb. 374, 379, 381; *post*, § 364.

13 *Voorhes v. Bonesteel*, 16 Wall. 16, 31; *Wells v. Smith*, 54 Ga. 262, 263; *Walker v. Carrington*, 74 Ill. 446, 465; *Owen v. Cawley*, 36 N. Y. 600, 604; *Miller v. Peck*, 18 W. Va. 75, 99.

14 *Wilber v. Abernethy*, 54 Ala. 644, 646; *Wood v. Terry*, 30 Ark. 385, 393; *Chappell v. Boyd*, 61 Ga. 662, 663; *Baron v. Voorhies*, 12 La. An. 852; *Kenton v. McClellan*, 43 Mich. 564, 566; *Lash v. Mitchell*, 71 N. Y. 199, 200.

15 *Woodman v. Neal*, 48 Me. 268. But see *ante*, §§ 41, 43; *post*, § 86.

16 *Merrill v. Parker*, 112 Mass. 250, 253.

17 *McLaren v. Hall*, 26 Iowa, 297, 305; *infra*, notes 21-24.

18 *Yazel v. Palmer*, 81 Ill. 82, 85; *Toolidge v. Smith*, 129 Mass. 554, 558; *Paine v. Farr*, 118 Mass. 74, 77; *Merrick v. Plumley*, 99 Mass. 573; *Hill v. Chambers*, 30 Mich. 428; *Early v. Rolfe*, 95 Pa. St. 58, 61; *Hamilton v. Brooks*, 51 Tex. 142, 146.

19 Griffin v. Ransdell, 71 Ind. 440, 445; Yazel v. Palmer, 81 Ill. 82, 85; Coleman v. Semmes, 56 Miss. 321, 329; Spaulding v. Drew, 55 Vt. 253, 257.

20 Yazel v. Palmer, 81 Ill. 82, 85.

21 Mann, 50 Pa. St. 375, 381.

22 Levy v. Gray, 56 Miss. 318, 320. But see Canty v. Sanderford, 37 Ala. 91; *post*, § 121.

23 *Post*, ch. xxiii., §§ 409, *et seq.*

24 Wood v. Terry, 30 Ark. 385, 393.

25 Arnold v. Spurr, 130 Mass. 347, 349. Ratifies by accepting benefit; Morrison v. Bowman, 29 Cal. 337; Marts v. Cumberland, 44 N. J. L. 478.

26 Coolidge v. Smith, 129 Mass. 554, 557.

27 Delacroix v. Nolan, 7 La. An. 682.

28 Merrill v. Parker, 112 Mass. 250, 253.

29 Chappell v. Boyd, 61 Ga. 662, 669.

30 Ladd v. Hildebrant, 27 Wis. 135, 143; 9 Am. Rep. 445; *post*, § 86.

31 Merrick v. Plumbly, 99 Mass. 566, 573; Coolidge v. Smith, 129 Mass. 554, 558; *supra*, n. 18.

32 Lavassar v. Washburne, 50 Wis. 200, 202.

33 Ames v. Hilton, 70 Me. 36, 47; Comegys v. Clarke, 44 Md. 108, 110.

34 Warner v. Warren, 46 N. Y. 228, 231; Lavassar v. Washburne 50 Wis. 200, 202; *post*, § 110.

35 Griffin v. Ransdell, 71 Ind. 440, 444.

36 Cubberly v. Scott, 93 Ill. 38, 40; Bellows v. Rosenthal, 31 Ind. 116, 118; *post*, § 89.

37 Reiman v. Hamilton, 111 Mass. 245, 246.

38 Manderback v. Mock, 29 Pa. St. 43, 47.

39 Early v. Rolfe, 95 Pa. St. 58, 60.

40 Bennett v. Stout, 98 Ill. 47, 52.

41 Coleman v. Semmes, 56 Miss. 321, 329.

42 Porter v. Gamba, 43 Cal. 105, 109; Miller v. Peck, 18 W. Va. 75, 99.

43 Griffin v. Ransdell, 71 Ind. 440, 444; Lichtenberger v. Graham, 50 Ind. 288, 290; Burchard v. Frazer, 23 Mich. 224, 236.

44 Wells v. Smith, 54 Ga. 262, 264; Myers v. King, 42 Md. 65, 70.

45 Pike v. Baker, 53 Ill. 163, 167.

46 Murphy v. Bright, 3 Grant, 296.

47 Wells v. Smith, 34 Ga. 262, 264; Cooper v. Ham, 49 Ind. 493, 497, cases cited; Myers v. King, 42 Md. 65, 70; Buckley v. Wells, 33 N. Y. 518, 521; Knapp v. Smith, 27 N. Y. 277, 280; Spooner v. Reynolds, 50 Vt. 437, 444; Miller v. Peck, 18 W. Va. 95, 99; cases cited, *post*, § 89.

48 Wells v. Thorman, 37 Conn. 318, 319; Griffin v. Ransdell, 71 Ind. 440, 444; Coolidge v. Smith, 129 Mass. 554, 559; Owen v. Cawly, 36 N. Y. 600, 605; Early v. Rolfe, 95 Pa. St. 58, 60; *post*, § 85.

49 Johnston, 31 Pa. St. 450, 454; *post*, §

50 Baker v. Roberts, 14 Ind. 552, 553.

51 Lindner v. Sabler, 57 Barb. 322; Graves v. Spier, 58 Barb. 349; *post*, ch. xxiv. But see *ante*, § 66.

52 *Ante*, § 56.

§ 85. Scope of husband's authority as agent for wife. —

1. The husband's agency *in law*<sup>1</sup> is co-determinate with his rights as husband over his wife's person and property;<sup>2</sup> he has no power to act for her in her separate existence.<sup>3</sup> Thus, *as husband* he has no authority to employ counsel to represent her separate property;<sup>4</sup> and with respect to such property notice to him is not notice to her,<sup>5</sup> except when he is her agent in fact;<sup>6</sup> he cannot create a mechanic's lien on her property<sup>7</sup> or encumber it even for necessary repairs;<sup>8</sup> or sell her realty,<sup>9</sup> or personalty;<sup>10</sup> or receipt for debts due her;<sup>11</sup> or release her mortgage;<sup>12</sup> nor can he make her member of a business association;<sup>13</sup> or render her liable for borrowed money;<sup>14</sup> or give her note even for a debt due by her.<sup>15</sup>

2. The husband's powers as agent *in fact*<sup>16</sup> are measured as in other cases by the scope of authority conferred;<sup>17</sup> they are the same as if he were acting for a stranger.<sup>18</sup> Thus, authority to collect a note does not give him the power to compromise,<sup>19</sup> though the general management of the wife's estate carries with it the power to submit her rights to arbitration;<sup>20</sup> nor does the right to manage and control include the right to sell;<sup>21</sup> nor can he as agent to collect his wife's rent waive her right to distrain.<sup>22</sup> The scope of his authority is a question of fact.<sup>22</sup> If he exceeds his authority he is personally liable.<sup>2</sup>

1 *Ante*, §§ 82, 84.

2 See *Chew v. Henrietta*, 1 McCreary C. Ct. 222, 226; *White v. King*, 53 Ala. 162, 167; *Gore v. Carl*, 47 Conn. 291, 293; *Windsor v. Bell*, 61 Ga. 671, 674; *Nevins v. Gourley*, 95 Ill. 206, 213; *Klein v. Seibold*, 80 Ill. 540, 542; *Johnson v. Tutewiler*, 35 Ind. 353; *Fitzgerald v. McCarty*, 55 Iowa, 702, 706; *Davis v. Ritchie*, 55 Iowa, 719, 721; *Price v. Leyd*, 1, 46 Iowa, 696; *Chadbourne v. Rockcliff*, 30 Me. 354, 361; *Jarden v. Pumphrey*, 36 Md. 361, 361; *Kerchner v. Kempton*, 47 Md. 568, 588; *Cahill v. Lee*, 55 Md. 319, 325; *Merrill v. Parker*, 112 Mass. 250, 253; *Fort v. Battle*, 13 Smedes & M. 133, 137; *McGehee v. White*, 31 Miss. 41, 46; *Garnett v. Berry*, 3 Mo. App. 197, 200; *Eystra v. Capelle*, 61 Mo. 573, 580; *Silvey v. Summer*, 61 Mo. 253; *Atwater v. Underhill*, 22 N. J. Eq. 599, 604; *Green v. Branton*, 1 Dev. Eq. 500, 504; *Coolidge v. Parris*, 8

Ohio St. 594, 597, 598; *Dearie v. Martin*, 78 Pa. St. 53, 57; *Trimble v. Reis*, 37 Pa. St. 448; *Dandridge v. Minge*, 9 Rand. 397, 403; *Ladd v. Hildebrant*, 27 Wis. 135, 143; 9 Am. Rep. 445. Consult *ante*, § 82, n. 14; § 84.

3 *Atwater v. Underhill*, 22 N. J. Eq. 599, 604; *McLaren v. Hall*, 26 Iowa, 237, 305.

4 *Kerchner v. Kempton*, 47 Md. 568, 588.

5 *Treadwell v. Hernden*, 41 Miss. 46; *Pringle v. Dunn*, 37 Wis. 449; 19 Am. Rep. 772.

6 *White v. King*, 53 Ala. 162, 167; *Jarden v. Pumphrey*, 36 Md. 361, 364; *Chew v. Henrietta*, 1 McCreary C. Ct. 222, 226. Compare *R. R. v. Brooks*, 81 Ill. 233.

7 *Garnett v. Berry*, 3 Mo. App. 197, 200. See *Jarden v. Pumphrey*, 36 Md. 361, 363; Md. R. C. 1873, p. 696, § 10.

8 *Dearie v. Martin*, 78 Pa. St. 53, 57.

9 *Eystra v. Capelle*, 61 Mo. 578, 580; *Ladd v. Hildebrant*, 27 Wis. 135, 143; 9 Am. Rep. 445.

10 *Klein v. Seibold*, 89 Ill. 540, 542.

11 *Gore v. Carl*, 47 Conn. 291, 293; *Windsor v. Bell*, 61 Ga. 671, 674; *Nevins v. Gourley*, 95 Ill. 206, 213; *Trader v. Lowe*, 45 Md. 412; *Read v. Earle*, 12 Gray, 423, 425; *Merrill v. Parker*, 112 Mass. 250, 255. Otherwise as to her property not separate: *Mobley v. Leophart*, 47 Ala. 257, 261; *Wemes*, 19 Md. 334, 344; *Sanders v. Forgasson*, 59 Tenn. 249, 254; *post*, §§ 243, 386.

12 *Trimble v. Reis*, 37 Pa. St. 448.

13 *Boyd v. Merrill*, 52 Ill. 151.

14 *Davis v. Ritchie*, 55 Iowa, 719, 721.

15 *Fitzgerald v. McCarty*, 55 Iowa, 702, 706.

16 *Ante*, §§ 82, 84.

17 *Atwater v. Underhill*, 22 N. J. Eq. 599, 604. See *Baker v. Roberts*, 14 Ind. 552, 53; *Carver*, 53 Ind. 241, 244; *Cahill v. Lee*, 55 Md. 319, 325; *Merrick v. Plumley*, 99 Miss. 566, 573; *Coleman v. Semmes*, 56 Miss. 321, 329; *post*, MARRIED WOMEN TRADERS, ch. xxvii.

18 *Livesley v. Lasalette*, 28 Wis. 38, 41.

19 *Carver*, 53 Ind. 241, 244.

20 *Coleman v. Semmes*, 56 Miss. 321, 329. He can submit to arbitration only the rights he can dispose of: *Milner v. Turner*, 4 Mon. 240, 247; *Fort v. Battle*, 13 Smedes & M. 133, 137.

21 *O'Brien v. Foreman*, 46 Cal. 80, 82.

22 *Cahill v. Lee*, 55 Md. 319, 325.

23 *Merrick v. Plumley*, 99 Mass. 566, 573; *Nash v. Mitchell*, 71 N. Y. 199, 201; 27 Am. Rep. 38.

24 *Wilder v. Abernethy*, 51 Ala. 614, 616; 25 Am. Rep. 734; *Glover v. Alcott*, 11 Mich. 470, 487.

§ 86. Proof of agency in fact of husband for wife.—To bind a wife for the act of her husband it must be shown that he did it as her agent<sup>1</sup> within the scope of his authority,<sup>2</sup> and that it was an act by which a married

woman could be bound.<sup>3</sup> His agency is proved as that of a stranger's,<sup>4</sup> though the fact that he is husband is relevant,<sup>5</sup> as in most cases the husband is the fittest person to be his wife's agent.<sup>6</sup> No unusual evidence is required of her to show he acted as her agent,<sup>7</sup> though when he has been in business in her name,<sup>8</sup> slight evidence will justify the inference that he acted on his own account.<sup>9</sup> And if she shows that property in his possession belonged to her separate estate, he will, unless a gift to him is proved,<sup>10</sup> be deemed to have held it as her agent.<sup>11</sup> So a deposit of money by her subject to his order is a mere power to him to draw, not a gift.<sup>12</sup> Possession of personal property is *prima facie* evidence of title,<sup>13</sup> and of right to collect in case of a bond,<sup>14</sup> but the possession may be shown to be wrongful.<sup>15</sup> To charge a wife by agent strong evidence is said to be necessary.<sup>16</sup> His declarations are evidence as part of the *res gestæ*.<sup>17</sup>

1 *Ante*, § 84.

2 *Ante*, § 85.

3 *Nash v. Mitchell*, 71 N. Y. 199, 201; 27 Am. Rep. 38.

4 See *Yazel v. Palmer*, 81 Ill. 82, 85; *Coolidge v. Smith*, 129 Mass. 554, 558; *Paine v. Farr*, 118 Mass. 74, 77; *Merrick v. Plumley*, 90 Mass. 573; *Hill v. Chambers*, 30 Mich. 428; *Early v. Rolfe*, 95 Pa. St. 58, 61; *Hamilton v. Brooks*, 51 Tex. 142, 146.

5 *Early v. Rolfe*, 95 Pa. St. 58, 60.

6 *Bennett v. Stout*, 98 Ill. 47, 52. Perhaps, *prima facie*, he is her agent to do all things which it is customary for husbands to do for their wives. Compare, *post*, § 90.

7 *Myers v. King*, 42 Md. 65, 70.

8 *Post*, § 87.

9 *Brownell v. Dixon*, 37 Ill. 197, 207. See *Erdman v. Rosenthal*, 60 Md. 312, 316.

\* 10 *Wales v. Newbould*, 9 Mich. 45, 64. See *Hileman*, 85 Ind. 1; *McNally v. Weld*, 30 Minn. 209.

11 *Patten*, 75 Ill. 446, 451. But see *Dillenberger v. Wrisberg*, 10 Mo. App. 465.

12 *Cunningham*, Myr. Prob. 76, 78; *post*, §§ 127, 128.

13 *Brownell v. Dixon*, 37 Ill. 197, 207; *post*, § 119.

14 *Griffin v. Ransdell*, 71 Ind. 440, 445.

15 *Yazel v. Palmer*, 81 Ill. 82, 85.



16 Carver, 53 Ind. 241, 244 : *Eystra v. Capelle*, 61 Mo. 578, 580.

17 *Livesley v. Lasalette*, 28 Wis. 38, 41.

### § 87. Compensation of husband as wife's agent —

1. *General rule.* A husband may, as his wife's agent, manage her separate property or separate business<sup>1</sup> with or without compensation;<sup>2</sup> but neither he nor any creditor of his has in the absence of special agreement any right in the property managed, earned, or accumulated through his agency.<sup>3</sup> Partnerships between husband and wife are not included within this discussion.<sup>4</sup>

2. *Express contract.* Contracts between husband and wife are in must States void,<sup>5</sup> and therefore there is usually no express contract by a wife to pay her husband for his services.<sup>6</sup> In cases when such contract can<sup>7</sup> and does exist, she may even be made his garnishee;<sup>8</sup> but in the absence of such contract neither he nor any creditor of his has any right against her or her property.<sup>9</sup>

3. *Implied contract.* There is no implied contract that a wife will pay her husband for his services.<sup>10</sup> His first duty is to support her and his family,<sup>11</sup> and in helping her to make her property productive he is but discharging this duty,<sup>12</sup> and is presumedly amply compensated with the home and support she allows him.<sup>13</sup> Moreover, as one's talents and capacity to labor are not property,<sup>14</sup> and as therefore no debtor can be made to work for his creditors,<sup>15</sup> a husband who is entitled to his wife's services may give them to her even against his creditors,<sup>16</sup> and may likewise give her his own labor,<sup>17</sup> but not his accumulations.<sup>18</sup>

4. *Apparant or pretended agency.* A husband may thus as his wife's agent manage her property or business without acquiring any rights in said property or business, or subjecting it to the claims of his creditors.<sup>19</sup>

But while apparently her agent and pretending to act in that capacity, he may be conducting a business of his own under her name simply for the purpose of evading his creditors,<sup>20</sup> or he may be using her property as a gift to him<sup>21</sup> or as a loan;<sup>22</sup> in such cases the business is his and the remedies of his creditors against the assets thereof are full.<sup>23</sup> So when she has no power by statute to trade, but with his consent is in a business which he conducts,<sup>24</sup> it is his business;<sup>25</sup> the right of his creditors against a business which he conducts can be questioned only when by statute she can trade alone.<sup>26</sup> When he has been using her property in his business, her rights are at best those of a creditor.<sup>27</sup> In some cases where a wife has amassed a fortune through the efforts of her husband, it has been held that a court of equity would in favor of his creditors make some apportionment<sup>28</sup>—treat the husband and wife as it were as partners.<sup>29</sup> Whether the business is the husband's or the wife's is simply a question of fact,<sup>30</sup> the burden of proof being generally on the wife to show that the business was hers.<sup>31</sup> So whether there is fraud is a question of fact.<sup>32</sup>

5. *Illustrations.* Thus where a husband with his team did a great deal of work on his wife's property, and his creditors attempted to sell the crop for his debts, the court held that he could give to her the labor of himself and his beasts, and that the accretions to her property continued hers and could not be touched by his creditors.<sup>33</sup> Where a manufacturer of large experience failed, and then started up again with his wife's money and in her name, and made a fortune, the court allowed her her money and interest, but held the remaining profits liable for his debts.<sup>34</sup> Where, while the wife's earnings belonged to her husband, he consented that she should trade in her own name, but took

part himself in the business, the business was held his, and therefore liable for his debts.<sup>35</sup>

6. *Statutes.* In some States there are statutes expressly referring to this subject.<sup>36</sup>

1 *Ante*, §§ 84, 85.

2 See *Lewis v. Johns*, 24 Cal. 98, 103; *Gage v. Dauchy*, 34 N. Y. 293, 299; *Rush v. Vought*, 55 Pa. St. 437, 445; *Webster v. Hildreth*, 33 Vt. 457, 458.

3 See fullest discussion: *Miller v. Peck*, 18 W. Va. 85, 79-96.

4 Except as below: See *post*, ch. xxvii.

5 *Scarborough v. Watkins*, 9 Mon. B. 540, 545; *ante*. §§ 41-44.

6 *Gage v. Dauchy*, 34 N. Y. 293, 297, 299; *Abbey v. Deyo*, 44 Barb. 374, 380.

7 Discussed, *ante*, §§ 40-44.

8 *Lewis v. Johns*, 24 Cal. 98, 103; *Keller v. Mayer*, 55 Ga. 406, 410; *Kingman v. Franks*, N. Y. Sup. Ct. Oct. 6, 1884; 26 D. Reg. 937; *Miller v. Peck*, 18 W. Va. 75, 100.

9 *McIntyre v. Knowlton*, 6 Allen, 565, 567; *Webster v. Hildreth*, 33 Vt. 457, 458; *infra*, n. 19.

10 *Lewis v. Johns*, 24 Cal. 98, 103.

11 *Cooper v. Ham*, 49 Ind. 393, 416; *Com. v. Fletcher*, 6 Bush, 171, 172; *Gage v. Dauchy*, 34 N. Y. 293, 297; *Abbey v. Deyo*, 44 N. Y. 343, 346; *ante*, § 64.

12 *Cooper v. Ham*, 49 Ind. 393, 416.

13 *McIntyre v. Knowlton*, 6 Allen, 565, 566.

14 Cases cited *infra*, notes 15, 16.

15 *Abbey v. Deyo*, 44 N. Y. 343, 347; *Rush v. Vought*, 55 Pa. St. 437, 445; *Hodges v. Cobb*, 8 Rich. 50, 56.

16 *Peterson v. Mulford*, 36 N. J. L. 481, 487; *Hoyt v. White*, 46 N. H. 45, 47; *ante*, § 65. He cannot give her money already earned by her: *Ante*, § 65.

17 *Miller v. Peck*, 18 W. Va. 75, 99; *infra*, n. 19.

18 *Isham v. Shafer*, 60 Barb. 317, 331; *Rush v. Vought*, 55 Pa. St. 437, 445; *Holdship v. Patterson*, 7 Watts, 547.

19 *Aldridge v. Muirhead*, 101 U. S. 397, 399; *Voorhes v. Bonesteel*, 16 Wall. 16, 31; *Lewis v. Johns*, 24 Cal. 98, 103; *Coon v. Rigden*, 4 Colo. 275, 287, 288; *Martinez v. Ward*, 19 Fla. 175, 188, 189; *Keller v. Mayer*, 55 Ga. 406, 409; *Wells v. Smith*, 54 Ga. 262, 264; *Olsen v. Kern*, 10 Ill. App. 578, 582; *Langford v. Ghleson*, 5 Ill. App. 362; *Cubberly v. Scott*, 98 Ill. 33, 40; *Bongard v. Core*, 82 Ill. 19, 20; *Bellows v. Rosenthal*, 31 Ind. 116, 118; *Cooper v. Ham*, 49 Ind. 393, 400, citing many cases; *Carn v. Royes*, 55 Iowa, 650; *Parker v. Bates*, 29 Kan. 597; *Com. v. Fletcher*, 6 Bush, 171, 172; *McIntyre v. Knowlton*, 6 Allen, 565, 567; *Merrick v. Plumley*, 29 Mass. 566; *Rankin v. West*, 25 Mich. 200; *Hossfeldt v. Dill*, 28 Minn. 469; *Hamilton v. Booth*, 55 Miss. 60; 30 Am. Rep. 500; *Gloss v. Thomas*, 6 Mo. App. 157; *Abbey v. Deyo*, 44 N. Y. 343, 346; 44 Barb. 382; *Owen v. Cawley*, 36 N. Y. 600, 604, 605; *Smith v. Sweeny*, 35 N. Y. 234, 235; *Gage v. Dauchy*, 34 N. Y. 293, 297, 299; *Buckley v. Wells*, 33 N. Y. 518, 521; *Knapp v. Smith*, 27 N. Y. 277, 280; *Rush v. Vought*, 55 Pa. St. 437, 445; *Holdship v. Patterson*, 7

Watts, 547; Hodges v. Cobb, 8 Rich. 50, 56; Webster v. Hildreth, 33 Vt. 457, 458; Miller v. Peck, 18 W. Va. 75, 79-97, citing many cases; Feller v. Alden, 23 Wis. 301, 304; Boss v. Gomber, 23 Wis. 284, 286; Dayton v. Walsh, 47 Wis. 113; 32 Am. Rep. 757. But see Penn v. Whiteheads, 12 Gratt. 74, 80; Wilson v. Loomis, 55 Ill. 352, 354. Compare cases *infra*, n. 28.

20 See Hurlbut v. Jones, 25 Cal. 225; Wortman v. Price, 47 Ill. 22; Brownell v. Dixon, 37 Ill. 198, 208; Cooper v. Ham, 49 Ind. 393, 416; Lalng v. Cunningham, 17 Iowa, 510; National v. Sprague, 20 N. J. Eq. 13, 25; Knapp v. Smith, 27 N. Y. 277, 280; Woodsworth v. Sweet, 51 N. Y. 8; Gage v. Dauchy, 34 N. Y. 293, 298.

21 See Dent v. Slough, 40 Ala. 518; Freeman v. Orrer, 5 Duer, 476.

22 Glidden v. Taylor, 16 Ohio St. 509, 520.

23 Brownell v. Dixon, 37 Ill. 198, 208; Gage v. Dauchy, 34 N. Y. 293, 298.

24 National v. Sprague, 20 N. J. Eq. 13, 25.

25 Wortman v. Price, 47 Ill. 22, 24; Erdman v. Rosenthal, 60 Md. 312, 316; Abbey v. Deyo, 41 N. Y. 343, 347; Bucher v. Ream, 68 Pa. St. 421, 426.

26 Shaekleford, 6 Bush, 149, 159. See Wortman v. Price, 47 Ill. 22, 24; Alt v. Laforette, 9 Mo. App. 91; Pawley v. Vogel, 42 Mo. 291; Lyman v. Place, 26 N. J. Eq. 30; National v. Sprague, 20 N. J. Eq. 13, 25; Quidort v. Pergeaux, 18 N. J. Eq. 472, 480; Bucher v. Ream, 68 Pa. St. 421, 426.

27 Wortman v. Price, 47 Ill. 22, 24; Glidden v. Taylor, 16 Ohio St. 509, 521; *infra*, notes 21, 26.

28 Cooper v. Ham, 49 Ind. 393, 416; Com. v. Fletcher, 6 Bush, 171, 172; Glidden v. Taylor, 16 Ohio St. 509, 520; Feller v. Alden, 23 Wis. 301, 305.

29 In Glidden v. Taylor, 16 Ohio St. 509, the wife was allowed only her money and legal interest; in National v. Sprague, 20 N. J. Eq. 13, the whole was held liable for the husband's debts. To treat them as partners would be fairer when there is really a mingling of goods, etc.: *Post*, § 129.

30 Keller v. Mayer, 55 Ga. 406, 409; Knapp v. Smith, 27 N. Y. 277, 280; Abbey v. Deyo, 41 N. Y. 343, 347. Of course, her capacity to trade is a question of law.

31 Discussed, *post*, §§ 118-121.

32 Myers v. King, 42 Md. 65, 70; *ante*, § 86.

33 Miller v. Peck, 18 W. Va. 95, 102.

34 Glidden v. Taylor, 16 Ohio St. 509, 520, 521.

35 National v. Sprague, 20 N. J. Eq. 13, 25.

36 See Porter v. Gomba, 43 Cal. 165, 169; Youngworth v. Jewell 15 Nev. 45.

§ 88. Instances and illustrations of husband's agency for wife. — When a husband holds what is shown to be his wife's separate property he is presumed to hold it as her agent,<sup>1</sup> unless he proves a gift or loan from her to him,<sup>2</sup> and the increase and profits thereof coming into

his hands are *prima facie* hers, and are free from any claim of his creditors.<sup>3</sup> So property bought for her with her money is *prima facie* hers,<sup>4</sup> and she may show that though he used his money he bought for her.<sup>5</sup> If he lives and works on his wife's estate he may do so as tenant,<sup>6</sup> or as agent and guest;<sup>7</sup> and if he trades with her money he may do so as her agent,<sup>8</sup> her creditor,<sup>9</sup> or her donee.<sup>10</sup> If he improves her property the improvements are hers.<sup>11</sup> If in exchanging<sup>12</sup> or buying<sup>13</sup> property for her he commits a fraud, she is liable. A statute providing that she may carry on business, but not when it is managed by her husband, merely protects his creditors and does not remove her liability.<sup>14</sup> If she gives her husband an order for her share of an estate and it is paid him, she is bound though he never pays it over to her.<sup>15</sup> Property of hers which is his by marital right, is his although he receives it as her agent in fact.<sup>16</sup> In procuring a policy on his life issued in her name and for her benefit a husband acts simply as his wife's agent.<sup>17</sup> When a husband contracts for his wife in his own name he may sue on the contract in his own name.<sup>18</sup>

1 See *Stewart v. Ball*, 33 Mo. 156; *Mellinger v. Bausman*, 45 Pa. St. 522; *Grahill v. Moyer*, 45 Pa. St. 530.

2 *Wales v. Newbould*, 9 Mich. 45, 64; *ante*, § 86. Compare *ante*, § 42.

3 *Buckley v. Wells*, 33 N. Y. 518, 521; *ante*, § 87.

4 *Davis v. Fredericks*, 104 U. S. 618; *Mason v. Bowles*, 117 Mass. 83; *Spooner v. Reynolds*, 50 Vt. 437, 444. Compare *Moulton v. Haley*, 57 N. H. 184; *ante*, § 42.

5 *Myers v. King*, 42 Md. 65, 70.

6 *Elijah v. Taylor*, 37 Ill. 247, 249; *Duncan v. Jackson*, 7 Ill. App. 119; *Mooreland v. Myall*, 14 Bush, 474.

7 *Boss v. Gomber*, 23 Wis. 284, 286. See *Stout v. Perry*, 70 Ind. 501. Compare *Neal v. Perkerson*, 61 Ga. 345; *Fiske v. Bailey*, 51 N. Y. 151.

8 *Cooper v. Ham*, 49 Ind. 393, 416; *ante*, § 87.

9 *Glidden v. Taylor*, 16 Ohio St. 509, 521; *ante*, § 87.

10 *Dent v. Slough*, 40 Ala. 518; *Lichtenberger v. Graham*, 50 Ind. 288; *ante*, § 87.

11 *Swaine v. Duane*, 48 Cal. 358; *Robinson v. Huffman*, 15 Mon. B. 80, 83; *Wilkinson*, 1 Head, 305, 310; *White v. Hildreth*, 32 Vt. 261, 267; *post*, § 131.

12 See *Vanneman v. Powers*, 7 Lans. 185; *Baum v. Mullen*, 47 N. Y. 579; *Graves v. Spler*, 58 Barb. 363. Not formerly *Birdseye v. Flint*, 3 Barb. 500.

13 *R. R. v. Brooks*, 81 Ill. 293. See *Baum v. Mullen*, 47 N. Y. 577.

14 *Porter v. Gamba*, 43 Cal. 105, 103.

15 *Clark v. Smith*, 13 S. C. 585.

16 *Kidwell v. Kirkpatrick*, 70 Mo. 214. Compare *Westmoreland v. Foster*, 60 Ala. 448.

17 *Southern v. Booker*, 9 Heisk. 606.

18 *Wilson v. Sands*, 36 Md. 38, 41.

### ARTICLE III.—AGENCY OF WIFE FOR HUSBAND.

§ 83. Appointment of wife.

§ 90. Wife's agency arising out of husband's absence, etc.

§ 91. Illustrations of wife's want of authority.

§ 92. Scope of wife's authority.

§ 93. Wife as husband's agent in business.

§ 94. Wife as husband's agent in household.

§ 95. Wife as husband's agent for necessaries.

§ 96. Authorities as to necessaries.

§ 97. Proof of wife's agency for husband.

§ 98. Determination of wife's agency for husband.

§ 89. **Appointment of wife as husband's agent.**—A wife may act as her husband's agent either by his authorization or by authority of law.<sup>2</sup> She has, however, no authority in law to act for him,<sup>3</sup> except for the purpose of realizing her right to support;<sup>4</sup> in all other cases any act of hers to be his must have, expressly or impliedly,<sup>5</sup> his prior authority contemporaneous assent, or subsequent ratification.<sup>6</sup>

1. *Prior authority.* If a man places<sup>7</sup> his wife at the head of the household,<sup>8</sup> or in charge of his business<sup>9</sup> or property,<sup>10</sup> he confers upon her such powers as persons in these positions usually exercise.<sup>11</sup> He may make her his agent in a purchase by promising her to pay for what she buys on his credit,<sup>12</sup> or in a sale by writing to

her to sell his goods and pay his debts;<sup>13</sup> or generally, by power of attorney.<sup>14</sup> So he may make her a special agent to collect rents,<sup>15</sup> and by telling another person to pay to her he makes her his agent to receive.<sup>16</sup> So by ratifying her acts on one occasion he may constitute her his agent for future acts of the same kind.<sup>17</sup>

2. *Assent estoppel.* If, though his wife has no authority to act for him, a husband stands by and sees her do so without objection, and a third party relying on this deals with her, he is estopped from denying her authority.<sup>18</sup> Thus, if he sees her selling her property,<sup>19</sup> or his property<sup>20</sup> without asserting his rights, he cannot afterwards deny her right to sell; so if he suffers her to collect debts,<sup>21</sup> which in law are his.<sup>22</sup> But his mere knowledge that she is making contracts does not render him liable on them.<sup>23</sup> He is liable for her torts<sup>24</sup> and crimes<sup>25</sup> committed in his presence.

3. *Ratification.* If his wife without authority has done some act for him,<sup>26</sup> and he subsequently with full knowledge of the facts<sup>27</sup> recognizes it as his, he ratifies her act and makes it his.<sup>28</sup> Thus, he ratifies her act when he accepts a boiler,<sup>29</sup> or liquor,<sup>30</sup> ordered by her on his account; when he says a note she has signed in his name is all right,<sup>31</sup> or promises to pay for something bought in his name;<sup>32</sup> when he delivers property of his which she has sold;<sup>33</sup> or when he sees her using goods she has bought on his credit<sup>34</sup> and does not object.<sup>35</sup> He may ratify some acts without ratifying all.<sup>36</sup> But he does not by resuming cohabitation with his wife ratify her acts done during a separation.<sup>37</sup>

4. *Exception.* If the wife has acted and has been dealt with on her own account, her husband is not liable for her acts;<sup>38</sup> it is doubtful whether he can ratify such acts,<sup>39</sup> or render himself liable therefor except on a new consideration.<sup>40</sup> Thus, where a lightning rod agent on

her order and credit put rods on her husband's house, he was held not liable.<sup>41</sup> So where goods were so supplied to her.<sup>42</sup> To whom credit was given is a question of fact for the jury.<sup>43</sup>

1 Birdsall v. Dunn, 16 Wis. 235, 238. See Dodd v. Acklom, 6 Man. & G. 673, 681; Dunnahoe v. Williams, 24 Ark. 261, 268; Benjamin, 15 Conn. 347, 354; 3) Am. Dec. 384; Singleton v. Mann, 3 Mo. 465, 468; Savage v. Davis, 18 Wis. 608, 612.

2 *Ante*, § 82.

3 Benjamin, 15 Conn. 347, 354; 3) Am. Dec. 384; Wheeler v. Morgan, 29 Kan. 519; Stewart M. & D. § 180; *ante*, § 64; *post*, § 91.

4 Stewart M. & D. § 180; *post*, §§ 90, 95; *ante*, § 64.

5 Sawyer v. Cutting, 23 Vt. 486, 490; *post*, § 97.

6 Debenham v. Mellon, Law R. 5 Q. B. D. 344, 402; Law R. 6 App. C. 24, 33; Benjamin, 15 Conn. 347, 354; 3) Am. Dec. 384; Rotch v. Miles, 2 Conn. 638, 645; Godfrey v. Brooks, 5 Har. (Del.) 396; Gulick v. Grover, 31 N. J. L. 182, 184; 33 N. J. L. 463; Hopkins v. Mollinieux, 4 Wend. 465, 467; Webster v. McGinnis, 5 Binn. 235, 236; Reakert v. Sanford, 5 Watts & S. 164, 168; Leeds v. Vail, 15 Pa. St. 185, 188; De Hoy v. Dennis, 14 Rich. Eq. 27; Meader v. Page, 39 Vt. 303, 309, 310; Delano v. Blanchard, 52 Vt. 578, 584; Butts v. Newton, 29 Wis. 632, 639; cases *post*, § 91.

7 The mere fact that she lives in his house or attends to his business is *prima facie* evidence of this: *Post*, §§ 93, 94, 97.

8 See Filker v. Emerson, 16 Ohio St. 653, 655; 42 Am. Dec. 532; Savage v. Davis, 18 Wis. 608, 613; *post*, § 94.

9 See Rotch v. Miles, 2 Conn. 638, 645; Jenkins v. Flinn, 37 Ind. 341, 352; Webster v. McGinnis, 5 Binn. 230, 236; *post*, § 93.

10 See Benjamin, 15 Conn. 347, 356; 3) Am. Dec. 384; *post*, § 90.

11 *Post*, §§ 90, 92.

12 Day v. Burnham, 36 Vt. 37, 39.

13 Shoemaker v. Kunkle, 5 Watts, 107, 108.

14 Whitten, 3 Cush. 191, 193, 197.

15 Cheney v. Pierce, 38 Vt. 515, 525.

16 Stall v. Meek, 70 Pa. St. 181, 182.

17 Compare Filmer v. Lynn, 4 Nev. & M. 559, 562; and Bray v. Beard, 5 Mo. App. 544. See *post*, § 94.

18 See Thrasher v. Tuttle, 22 Me. 335, 336; Huff v. Price, 50 Mo. 228, 230; Reakert v. Sanford, 5 Watts & S. 164, 168; Delano v. Blanchard, 52 Vt. 578, 584. Compare *ante*, § 84.

19 Huff v. Price, 50 Mo. 228, 230. Compare Cheney v. Pierce, 38 Vt. 515, 525.

20 Delano v. Blanchard, 52 Vt. 578, 584.

21 Thrasher v. Tuttle, 22 Me. 335, 336.

22 *Post*, § 176.

23 Reakert v. Sanford, 5 Watts & S. 164, 168. See *post*, § 97.

24 *Ante*, § 66.

25 *Ante*, § 63.



26 Not if she acts and is dealt with on her own account: *Meiners v. Munson*, 53 Ind. 138, 141. See *infra*, n. 38. He can ratify it if it is done for her benefit: *Millard v. Harvey*, 34 Beav. 237.

27 *Gulick v. Grover*, 33 N. J. L. 463, 467.

28 *Mickleberry v. Harvey*, 58 Ind. 523, 525; *Hopkins v. Mollinieux*, 4 Wenl. 465, 467; *Sawyer v. Cutting*, 23 Vt. 436, 430; *post*, § 97.

29 *Hill v. Sewald*, 51 Pa. St. 271, 273.

30 *Tuttle v. Holland*, 43 Vt. 542, 545.

31 *Shaw v. Emery*, 33 Me. 434, 439. See *Dresel v. Jordan*, 104 Mass. 407, 413.

32 *Day v. Burnham*, 26 Vt. 37, 39.

33 *Pike v. Baker*, 53 Ill. 163, 166.

34 *Cothran v. Lee*, 24 Ala. 380, 381; *Gilman v. Andrus*, 28 Vt. 241, 242.

35 *Heney v. Sargent*, 54 Cal. 306, 317.

36 *Butts v. Newton*, 29 Wis. 632, 640.

37 *Oinson v. Heritage*, 45 Ind. 73, 76; 15 Am. Rep. 253. But see *Rennick v. Ficklin*, 5 Mon. B. 168.

38 See *Bentley v. Griffin*, 5 Taunt. 356; *Taylor v. Britton*, 1 Car. & P. 144, n.; *Dixon v. Hurrell*, 8 Car. & P. 817; *Metcalfe v. Shaw*, 3 Camp. 22; *Harvey v. Norton*, 4 Jur. 42, 43; *Jewsbury v. Newbold*, 26 Law J. Ex. 247; *Pearson v. Darrington*, 32 Ala. 227, 241, 242; *Taylor v. Shelton*, 30 Conn. 122, 127, 128; *Morris v. Root*, 65 Ga. 686, 688; *Connerat v. Goldsmith*, 6 Ga. 14; *Jenkins v. Flinn*, 37 Ind. 349, 352; *Meiners v. Munson*, 53 Ind. 138, 142; *Weisker v. Lowenthal*, 31 Md. 413, 418; *Powers v. Russell*, 26 Mich. 179; *Swett v. Penrice*, 24 Miss. 416; *Cook v. Ligon*, 54 Miss. 338; *Hill v. Goodrich*, 46 N. H. 41; *Wilson v. Herbert*, 41 N. J. L. 454, 461; *Stammers v. Macomb*, 2 Wend. 454; *Simmons v. McElwain*, 26 Barb. 420; *Moses v. Fogartie*, 2 Hill (S. C.) 335; *Happek v. Hartby*, 7 Baxt. 411, 414; *Catron v. Warren*, 1 Cold. 358; *Roberts v. Kelley*, 51 Vt. 97, 101; *Bugbee v. Blood*, 45 Vt. 497, 501; *Carter v. Howard*, 39 Vt. 106, 110.

39 *Meiners v. Munson*, 53 Ind. 138, 142.

40 *Happek v. Hartby*, 7 Baxt. 411, 414.

41 *Meiners v. Munson*, 53 Ind. 138, 142.

42 *Weisker v. Lowenthal*, 31 Md. 413, 418.

43 *Bentley v. Griffin*, 5 Taunt. 356; *Jewsbury v. Newbold*, 26 Law J. Ex. 247; *Weisker v. Lowenthal*, 31 Md. 413; *supra*, n. 38; *post*, § 97.

§ 90. **Wife's agency for husband arising from his absence or sickness.**—If a husband is absent from home and has left his wife in charge of his house, his business, or his property, she has, as his agent, such powers with respect thereto as persons in such positions of trust usually exercise;<sup>1</sup> and her powers are more extensive if his absence is long.<sup>2</sup> While, except in cases where she pledges his credit for support which he owes but denies her,<sup>3</sup> her agency for him is a mere question of

fact,<sup>4</sup> and he is not bound by her acts if he has forbidden her to act for him, whether the party who seeks to bind him knew of such prohibition or not,<sup>5</sup> yet if he holds her out or allows her to act as his agent, he is estopped from setting up any secret instructions to her;<sup>6</sup> and, therefore, it seems, if he has left her in charge of his affairs, his private directions do not limit her authority to act for him.<sup>7</sup> To illustrate: During her husband's absence a wife is the head of the family,<sup>8</sup> and may do all things relating to the family and family home, which wives usually do;<sup>9</sup> she may throw open her husband's house in hospitality;<sup>10</sup> she may employ laborers for his farm;<sup>11</sup> she may repair his property,<sup>12</sup> and do all things necessary to preserve it;<sup>13</sup> she may employ counsel to protect his rights;<sup>14</sup> she may feed his cattle with his crops;<sup>15</sup> she may hire out his horse, perhaps,<sup>16</sup> and she may carry on his business in the usual way.<sup>17</sup> But she has only usual and customary powers;<sup>18</sup> she cannot make a contract for him out of the ordinary course of his business and at special rates;<sup>19</sup> she cannot sell his property,<sup>20</sup> unless this is necessary to procure support,<sup>21</sup> or he has abandoned all rights in it to her;<sup>22</sup> she cannot revoke a special license given by him to enter his premises,<sup>23</sup> or give a license which he cannot revoke.<sup>24</sup> Where her husband is ill she has much the same powers as when he is absent.<sup>25</sup> But his lunacy deprives her of all authority in fact,<sup>26</sup> save to put him in an asylum.<sup>27</sup>

In all these cases, however, she may have authority in law and by the mere fact that she is his wife to pledge his credit for necessities,<sup>28</sup> or to sell his goods for necessary support for herself and family.<sup>29</sup>

1 *Krebs v. O'Grady*, 23 Ala. 726, 732; *Lawrence v. Spear*, 17 Cal. 421, 424; *Benjamin*, 15 Conn. 347, 353, 354; 39 Am. Dec. 384; *Rotch v. Miles*, 2 Conn. 638, 645; *Kellogg v. Robinson*, 32 Conn. 335, 341; *Castel*, 8 Blackf. 240, 242; 44 Am. Dec. 763; *Fisher v. Conway*, 21 Kan. 13, 24; *Buford v. Speed*, 11 Bush, 338, 343; *Schindel*, 12 Md. 108, 120;

*Edgerly v. Whalan*, 106 Mass. 307, 308; *Nelson v. Garey*, 114 Mass. 418, 419; *Chamberlain v. Davis*, 33 N. Y. 121, 129; *Brouer v. Vanderburgh*, 31 Barb. 648, 649; *Church v. Landers*, 10 Wend. 79, 80; *Cox v. Hoffmann*, 4 Dev. & B. 180, 181; *Rosenthal v. Mayhugh*, 33 Ohio St. 155, 161; *Alexander v. Miller*, 16 Pa. St. 216, 220; *Webster v. McGinnis*, 5 Bunn. 235, 236; *Hell v. Sewald*, 52 Pa. St. 271; *Humes v. Taber*, 1 R. I. 464, 473; *Cheek v. Bellows*, 17 Tex. 613, 616; *Meador v. Page*, 39 Vt. 306, 308; *Spencer v. Storrs*, 33 Vt. 156, 158; *Sawyer v. Cutting*, 23 Vt. 486, 490; *Felker v. Emerson*, 16 Vt. 653, 655; 42 Am. Dec. 532; *Savage v. Davis*, 18 Wis. 608, 612; *Butts v. Newton*, 29 Wis. 632, 639; *Stewart M. & D.* § 174.

2 *Meador v. Page*, 39 Vt. 306, 309.

3 *Benjamin*, 15 Conn. 347, 354; 39 Am. Dec. 384; *Stewart M. & D.* § 180.

4 *Debenham v. Mellon*, Law R. 5 Q. B. D. 394, 402; Law R. 6 App. C. 24, 33; *Rotch v. Miles*, 2 Conn. 638, 645; *Godfrey v. Brooks*, 5 Har. (Del.) 396; *Gulick v. Grover*, 31 N. J. Eq. 182, 184; 33 N. J. Eq. 463; *Hopkins v. Mollinieux*, 4 Wend. 465, 467; *Reakert v. Sanford*, 5 Watts & S. 164, 168; *Leeds v. Vail*, 15 Pa. St. 185, 188; *DeHay v. Dennis*, 14 Rich. Eq. 27; *Meador v. Page*, 39 Vt. 306, 309, 310; *Delano v. Blanchard*, 52 Vt. 578, 584; *Butts v. Newton*, 29 Wis. 632, 639.

5 *Debenham v. Mellon*, Law R. 6 App. C. 24, 32; Law R. 5 Q. B. D. 394, 399, 401; *Jolly v. Rees*, 15 Conn. B. N. S. 628; *Clark v. Cos*, 32 Mich. 204, 213; *Keller v. Phillips*, 39 Ves. 351. Compare *Barr v. Armstong*, 56 Mo. 577, 581, 588.

6 *Debenham v. Mellon*, Law R. 6 App. C. 24, 33. See *Thrasher v. Tuttle*, 22 Me. 335, 336; *Huff v. Price*, 50 Mo. 228, 230; *Reakert v. Sanford*, 5 Watts & S. 164, 168; *Delano v. Blanchard*, 52 Vt. 578, 584.

7 *Church v. Landers*, 10 Wend. 79, 80. See *Rotch v. Miles*, 2 Conn. 638, 649.

8 *Felker v. Emerson*, 16 Vt. 653, 655; 42 Am. Dec. 532; *Sawyer v. Cutting*, 23 Vt. 486, 490.

9 *Benjamin*, 15 Conn. 347, 353; 39 Am. Dec. 384; *Weaver v. Page*, 39 Vt. 306, 309; *Savage v. Davis*, 18 Wis. 608, 613.

10 *Humes v. Taber*, 1 R. I. 464, 473.

11 *Rotch v. Miles*, 2 Conn. 638, 646.

12 *McAfee v. Robertson*, 41 Tex. 355, 358.

13 *Butts v. Newton*, 29 Wis. 632, 639.

14 *Rotch v. Miles*, 2 Conn. 464, 473; *Ruford v. Speed*, 11 Bush, 338, 343.

15 *Felker v. Emerson*, 16 Vt. 653, 655; 42 Am. Dec. 532.

16 *Church v. Landers*, 10 Wend. 79, 80. But see *Savage v. Davis*, 18 Wis. 608, 610, 614.

17 *Krebs v. O'Grady*, 23 Ala. 726, 732; 58 Am. Dec. 312.

18 *Sawyer v. Cutting*, 23 Vt. 486, 490.

19 *Reakert v. Sanford*, 5 Watts & S. 164, 168.

20 *Butts v. Newton*, 29 Wis. 632, 639. See *Benjamin*, 15 Conn. 347, 353, 354; 39 Am. Dec. 384.

21 *Lawrence v. Spear*, 17 Cal. 421, 424; *infra*, n. 29.

22 *Butts v. Newton*, 29 Wis. 632, 638; *Stewart M. & D.* § 177.

23 *Kellogg v. Robinson*, 32 Conn. 335, 341.

24 *Nelson v. Gray*, 114 Mass. 418, 419.

25 *Alexander v. Miller*, 16 Pa. St. 215, 219; *Sawyer v. Cutting*, 23 Vt. 486, 491.

26 *Alexander v. Miller*, 16 Pa. St. 215, 220.

27 *Davis v. Merrill*, 47 N. H. 203, 211.

28 *Stewart M. & D.* §§ 177, 180.

29 *Roland v. Logan*, 18 Ala. 307, 310; *Lawrence v. Spear*, 17 Cal. 421, 424; *Ahern v. Easterby*, 42 Conn. 546, 559; *Benjamin*, 15 Conn. 347, 354; 39 Am. Dec. 384; *Casteel*, 8 Blackf. 240, 242; 44 Am. Dec. 763; *Rawson v. Spangler*, 62 Iowa, 59, 61; 18 Cent. L. J. 29, 30; *Cunningham v. Reardon*, 92 Mass. 538; *Rosenthal v. Mayhugh*, 33 Ohio St. 155, 161; *Alexander v. Miller*, 16 Pa. St. 215, 219, 220; *Sawyer v. Cutting*, 23 Vt. 486, 491; *Norcross v. Rodgers*, 30 Vt. 588, 589. But see *Edgerly v. Whalen*, 106 Mass. 307, 308. See *Stewart M. & D.* §§ 174, 177.

§ 91. Illustrations of wife's want of authority. — Unless a husband has in some way appointed his wife his agent she has no authority to act for him<sup>1</sup> except to pledge his credit for necessaries.<sup>2</sup> Thus, no contract made by her during coverture binds him;<sup>3</sup> he is not liable for rent of her separate property;<sup>4</sup> payment to her of money due him is no discharge,<sup>5</sup> nor is her receipt;<sup>6</sup> she cannot indorse a note payable to her which belongs to him;<sup>7</sup> or draw his money from bank;<sup>8</sup> she cannot sell his goods;<sup>9</sup> he is not liable for money deposited with her;<sup>10</sup> her recognition of his debt does not take it out of the Statute of Limitations;<sup>11</sup> she cannot manage his law suit;<sup>12</sup> one who receives his property from her is liable to him in trover.<sup>13</sup> To render him liable in such cases her agency in fact must be proved.<sup>14</sup>

1 *Sawyer v. Cutting*, 23 Vt. 486, 490; *ante*, §§ 89, 90.

2 *Ante*, §§ 81, 89; *post*, § 5; *Stewart M. & D.* § 180.

3 *Whitworth v. Hart*, 22 Ala. 343; *Dunnahoo v. Williams*, 24 Ark. 264, 268; *Benjamin*, 18 Conn. 347, 354; 39 Am. Dec. 384; *Jaycox v. Wing*, 66 Ill. 182; *Wilbur*, 13 Met. 404; *Leeds v. Vail*, 15 Pa. St. 185, 188; *Mayse v. Briggs*, 3 Head, 36, 38; *ante*, § 67. Except as to community: *Cousins v. Kelsey*, 33 La. An. 880, 882. He may sometimes adopt them if executed: *Ham v. Boody*, 20 N. H. 411, 413; 51 Am. Dec. 235; *Lowry v. Naff*, 4 Cold. 370, 374.

4 *Biery v. Ziegler*, 93 Pa. St. 367; 39 Am. Rep. 756.

5 *Felch v. Beandry*, 40 Cal. 430. Compare *White*, 3 Miss. 931.

6 *Thrasher v. Tuttle*, 22 Me. 335, 336.

7 *Stevens v. Beals*, 10 Cush. 291, 292; 57 Am. Dec. 108. See *Roland v. Logan*, 18 Ala. 307.

- 8 *Allen v. Williamsburgh*, 2 Abb. N. C. 342, 345.
- 9 *Dunnahoe v. Williams*, 24 Ark. 264, 268; *Lewis v. Buttrick*, 102 Mass. 412; *Brown v. Hannibal*, 33 Mo. 309; *Bain v. Doran*, 54 Pa. St. 1-4; *Alexander v. Miller*, 16 Pa. St. 215, 219; *ante*, § 90.
- 10 *Gilbert v. Plant*, 18 Ind. 308, 311; *Andrews v. Ormsbee*, 41 Mo. 440.
- 11 *Morris v. Roots*, 65 Ga. 686, 688.
- 12 *Cobbett v. Hudson*, 15 Q. B. 988, 989. See *Hughes v. Mulvey*, 1 Sand. 92.
- 13 *Edgerly v. Whalan*, 106 Mass. 307, 308; *Green v. Sperry*, 16 Vt. 390, 392; 42 Am. Rep. 519.
- 14 *Post*, § 97.

§ 92. Scope of wife's authority as agent for husband. — A wife may be her husband's special or general agent; <sup>1</sup> she may have authority to do a particular act, or to act in a certain character.<sup>2</sup> Her authority in its scope includes all powers proper and usual to effectuate the purposes of the agency.<sup>3</sup> Thus, if her husband puts her in charge of his farm she may cultivate it, but not sell it;<sup>4</sup> if he gives her control of his business she may make all usual contracts therein, but not accommodation notes;<sup>5</sup> if he lives with her and she has charge of the domestic part of his establishment, she may employ servants and order what is needed, but she may not buy extravagant and extraordinary things.<sup>6</sup> If she exceeds her authority he is not bound,<sup>7</sup> though she may be.<sup>8</sup>

- 1 *Sawyer v. Cutting*, 23 Vt. 486, 490.
- 2 *Ewell's Evans Agency*, 102, 135.
- 3 *Benjamin*, 15 Conn. 347, 356; 39 Am. Dec. 384; *post*, §§ 93, 94; *ante*, § 90.
- 4 *Butts v. Newton*, 29 Wis. 632, 639; *supra*, n. 3.
- 5 *Holmes v. Grover*, 33 N. J. L. 463, 467; 31 N. J. L. 182, 184; *post*, § 93.
- 6 *Savage v. Davis*, 18 Wis. 608, 613; *Freestone v. Butcher*, 9 Car. & P. 643; *post*, § 94.
- 7 *Goodrich v. Tracy*, 43 Wis. 314, 320.
- 8 *Cody v. Phelps*, 47 Mich. 431. See *Miller v. Watt*, 70 Ga. 385, 387.

§ 93 Wife as husband's agent in business. — Very slight acts on the part of the husband will constitute his wife his agent in his business;<sup>1</sup> there seems to be a pre-

sumption, rebuttable of course,<sup>2</sup> if the business is carried on in a house where they live together that she is his agent;<sup>3</sup> and a jury is justified in finding her agency for him from the fact that she was seen twice in his store in charge of it,<sup>4</sup> or that he was absent and there was no one else to attend to it.<sup>5</sup> If she is in business not by authority of statute, but simply by his consent,<sup>6</sup> it is his business,<sup>7</sup> and he is liable for her acts,<sup>8</sup> even if she carries it on as a partner,<sup>9</sup> or in her name;<sup>10</sup> but he is not liable if she trades under a special statute,<sup>11</sup> for then the business is hers;<sup>12</sup> if it is his business he is liable, not if it is hers.<sup>13</sup> If she is his agent thus by implication she has only the usual and ordinary powers that persons in such a position exercise;<sup>14</sup> she may buy goods suitable for the trade;<sup>15</sup> she may give notes if such is the course of the business,<sup>16</sup> but not otherwise,<sup>17</sup> and not accommodation notes;<sup>18</sup> nor if he has given a note can she take it back and give another in its place.<sup>19</sup> In keeping his tavern she cannot make a long and special contract for horse feed at reduced rates.<sup>20</sup> If she has authority only to give his note, she must make it in his name or as his agent.<sup>21</sup> A note in her own name will not bind him.<sup>22</sup> If she exceeds her authority,<sup>23</sup> he may of course ratify her acts;<sup>24</sup> as by suing on a note given her as part of a transaction she had no authority to conduct.<sup>25</sup> So he is bound by false representations made by her as agent in the course of his business.<sup>26</sup> But if all the credit is given the wife, the husband is not bound.<sup>27</sup>

1 See also *ante*, §§ 89, 90; *post*. § 97.

2 See *Debenham v. Mellon*, Law R. 6 App. C. 24, 32; *post*, § 94.

3 *McKinley v. McGregor*, 3 Whart. 369.

4 *Plummer v. Sills*, 3 Nev. & M. 422.

5 *Rotch v. Miles*, 2 Conn. 638, 645; *ante*, § 90.

6 *Post*, MARRIED WOMEN TRADERS, ch. xxvii.

7 *Ante*, §§ 65, 87.

8 *Godfrey v. Brooks*, 5 Har. (Del.) 396; *Oxnard v. Swanton*, 39 Me. 125.

9 *Everit v. Watts*, 10 Paige, 82.

10 *Petty v. Anderson*, 3 Bing. 170.

11 *Colby v. Lamson*, 39 Me. 117; *Gillies v. Lent*, 2 Abb. Fr. N. S. 255.

12 *Post*, ch. xxvii.

13 *Oxnard v. Swanton*, 39 Me. 125.

14 *Benjamin*, 15 Conn. 347, 356; 39 Am. Dec. 384; *ante*, § 92.

15 *Phillipson v. Hayter*, Law R. 6 Com. P. 33, 41.

16 *Holmes v. Grover*, 33 N. J. L. 463, 466; 31 N. J. L. 182, 184.

17 *Reakert v. Sanford*, 5 Watts & S. 164, 168.

18 *Holmes v. Grover*, 33 N. J. L. 463, 467; 31 N. J. L. 182, 184.

19 *Shaw v. Emery*, 38 Me. 484.

20 *Webster v. McGinnis*, 5 Binn. 235, 236.

21 *Galusha v. Hitchcock*, 29 Barb. 193, 194.

22 *Minard v. Mead*, 7 Wend. 68, 69.

23 *Ante*, § 92.

24 *Ante*, § 89.

25 *George v. Cutting*, 46 N. H. 130.

26 *Taylor v. Green*, 8 Car. & P. 316, 319.

27 *Ante*, § 89, n. 38.

§. 94. **Wife as husband's agent in household.**—The husband is head of his family,<sup>1</sup> and in regulating his household may or may not put his wife in charge of certain departments thereof, and make her his general agent in all matters appertaining to their domestic life,<sup>2</sup> whether he has or has not made her his agent is always, except when she relies on her agency in law for support,<sup>3</sup> a mere question of fact to be determined from all the circumstances of the case;<sup>4</sup> whether a particular act was within the scope of her agency is a mixed question of law and fact.<sup>5</sup>

1. *Appointment.* (1) If husband and wife are permanently separated, and the wife has an establishment, even if it has been given her by him, it is hers, and there is no presumption that she may keep it up at his expense.<sup>6</sup> (2) If they are only temporarily separated through his absence, and she is apparently in charge of his establishment, there is a very strong presumption

that she is his general agent in the management of it.<sup>7</sup> (3) If they are living together, but are boarding or have no establishment, the fact of their cohabitation raises no presumption whatever of any agency of hers for him.<sup>8</sup> (4) If they are living together, and are keeping house, there is a presumption that she has charge of the domestic part thereof.<sup>9</sup> The presumptions of her agency in cases (2) and (4) are rebuttable,<sup>10</sup> and the husband may relieve himself of liability by showing that his domestic arrangements excluded any such agency on her part,<sup>11</sup> or that he prohibited her from acting on his account;<sup>12</sup> and it makes no difference whether the third party was informed of this or not.<sup>13</sup> But if it appears that he in some way allowed her to seem to have charge of his house or recognized her acts as his agent therein,<sup>14</sup> the mere fact that he privately forbade her to act for him will not relieve him of liability.<sup>15</sup> And when he has once recognized her agency, though he may revoke it at any time,<sup>16</sup> such revocation will have no effect as to persons with whom he has allowed her to deal as his agent unless they are specially notified thereof.<sup>17</sup> In fine, her agency is in kind, though perhaps not so limited in scope,<sup>18</sup> the same as that of a steward or servant placed in charge of his house;<sup>19</sup> and therefore it makes no difference whether she is his legal wife or not.<sup>20</sup> But if all the credit is given to her he is not liable.<sup>21</sup>

2. *Scope of authority.* When the wife is her husband's agent in managing the household, her authority covers all such matters as wives in such a position usually attend to,<sup>22</sup> and includes the right to do whatever is necessary, proper, or usual to effectuate the purposes of her agency.<sup>23</sup> Thus, she may deal on his credit with butcher, baker, etc.<sup>24</sup> She may give reasonable charity;<sup>25</sup> she may extend usual hospitality;<sup>26</sup> she may



employ necessary servants;<sup>27</sup> and may in fact procure on his credit all such things as belong to the class "necessaries,"<sup>28</sup> whether really needed or not.<sup>29</sup> But she cannot thus procure extraordinary and extravagant things,<sup>30</sup> although if she thus exceeds her authority he may ratify her acts,<sup>31</sup> and is therefore liable for whatever things he permits her to receive into his house,<sup>32</sup> unless he supposes she has paid for them.<sup>33</sup> The extent of her authority naturally depends largely on their station in life.<sup>34</sup>

1 *Ante*, § 60.

2 See 1 Bish. M. & D. § 355.

3 Stewart M. & D. § 180; *ante*, §§ 64, 81; *post*, §§ 95, 96.

4 Reid v. Teakle, 13 Com. B. 627; Ryan v. Sams, 12 Q. R. 460; Debenham v. Mellon, L. R. 6 App. C. 24, 32; Clark v. Cox, 32 Mich. 209, 213; Keller v. Phillips, 39 N. Y. 351; *ante*, § 89, n. 6.

5 See Reneaux v. Teakle, 8 Ex. 680; Lane v. Iremonger, 13 Mees. & W. 368; Parke v. Kleeber, 37 Pa. St. 251; discussion in 2 Smith, L. C. 404, *et seq.*

6 See Debenham v. Mellon, Law R. 6 App. C. 24; Law R. 5 Q. B. D. 395; Manby v. Scott, 1 Lev. 4; 2 Smith, L. C. 402.

7 Rotch v. Miles, 2 Conn. 638, 645; *ante*, § 90.

8 Debenham v. Mellon, Law R. 6 App. C. 24, 33; Law R. 5 Q. B. D. 395.

9 Debenham v. Mellon, Law R. 5 Q. B. D. 394, 402; Clifford v. Laton, 3 Car. & P. 15, 16; Reneaux v. Teakle, 8 Ex. 680; Phillipson v. Hayter, Law R. 6 Com. P. 38, 41, 42; Ruddock v. Marsh, 1 Hurl. & N. 601; Emmett v. Norton, 8 Car. & P. 506, 510; Freestone v. Butcher, 9 Car. & P. 643; Montague v. Benedict, 3 Barn. & C. 631, 635; Hughes v. Chadwick, 6 Ala. 651; Benjamin, 15 Conn. 347, 357; 39 Am. Dec. 381; Shelton v. Hoadley, 15 Conn. 535; Johnston v. Pike, 14 La. An. 731; Furlong v. Hysom, 35 Me. 332; Eames v. Sweetser, 101 Mass. 78; Harshaw v. Merryman, 18 Mo. 106; Pickering, 6 N. H. 120, 124; Tebbetts v. Hapgood, 34 N. H. 420; Sterling v. Potts, 5 N. J. L. 773; Keller v. Phillips, 39 N. Y. 351; Cromwell v. Benjamin, 41 Barb. 558; Meade v. Page, 39 Vt. 306, 308; Sawyer v. Cutting, 23 Vt. 486, 490; Bugbee v. Blood, 43 Vt. 499, 501; Savage v. Davis, 18 Wis. 608, 613.

10 Debenham v. Mellon, Law R. 6 App. C. 24, 32, 37; 50 Law J. Q. B. D. 155; Law R. 5 Q. B. D. 394, 402; 49 Law J. Q. B. D. 497; Clark v. Cox, 32 Mich. 204, 213; *supra*, n. 9; *post*, §

11 See Barr v. Armstrong, 56 Mo. 577, 581. Giving her an allowance is not alone sufficient: Ruddock v. Marsh, 1 Hurl. & N. 601, 604; Holt v. Brien, 4 Barn. & Adol. 352.

12 Morgan v. Chetwynd, 4 Fost. & F. 451, 453, 459.

13 Debenham v. Mellon, Law R. 6 App. C. 24, 32; Law R. 5 Q. B. D. 394, 402; Jolly v. Rees, 15 Com. B. N. S. 628.

14 See *ante*, §§ 89, 90; *post*, § 97.

15 Debenham v. Mellon, Law R. 6 App. C. 24, 33.

- 16 Wallis v. Beddick, 22 Week. R. 1; Debenham v. Mellon, Law R. 5 Q. B. D. 394, 403; Daubney v. Hughes, 60 N. Y. 186, 191; *post*, § 98.
- 17 Cany v. Patton, 2 Ashm. 140.
- 18 Benjamin, 15 Conn. 347, 357; 39 Am. Dec. 384; *infra*, n. 22, 23.
- 19 Debenham v. Mellon, Law R. 5 Q. B. D. 394, 399; Law R. 6 App. C. 24, 33.
- 20 Blades v. Free, 9 Barn. & C. 167, 171; Robinson v. Nahon, 1 Camp. 245; Watson v. Threlkeld, 2 Esp. 637.
- 21 *Ante*, § 89, n. 38.
- 22 Ruddock v. Marsh, 1 Hurl. & N. 601, 601; Emmett v. Norton, 8 Car. & P. 506, 510; Philipson v. Hayter, Law R. 6 Com. P. 38, 42; Montague v. Benedict, 3 Barn. & C. 631, 635; Pickering, 6 N. H. 120, 124; Bugbee v. Blood, 48 Vt. 499, 501; Meader v. Page, 39 Vt. 306, 308; Sawyer v. Cutting, 23 Vt. 486, 490; Savage v. Davis, 18 Wis. 608, 613; *ante*, §§ 90, 92.
- 23 Benjamin, 15 Conn. 347, 356, 358; 39 Am. Dec. 384; *ante*, § 92.
- 24 Debenham v. Mellon, Law R. 6 App. C. 24, 36.
- 25 Spencer v. Stores, 38 Vt. 156, 158.
- 26 Humes v. Taber, 1 R. I. 464, 473.
- 27 White v. Cuyler, 6 Term. 176; Condon v. Callahan, 9 Abb. N. C. 407, 411. Compare Rotch v. Miles, 2 Conn. 638, 646.
- 28 *Post*, § 95; Stewart M. & D. § 180.
- 29 Ruddock v. Marsh, 1 Hurl. & N. 601, 601; *post*, § 95.
- 30 Freestone v. Butcher, 9 Car. & P. 643.
- 31 Mickelberry v. Harvey, 58 Ind. 523, 525; *ante*, § 89; *post*, § 95.
- 32 Gilman v. Andrus, 28 Vt. 241, 242. See Waithman v. Wakefield, 1 Camp. 120, 121; Atkins v. Curwood, 7 Car. & P. 756, 760.
- 33 Morgan v. Chetwynd, 4 Fost. & F. 451, 459.
- 34 Keller v. Phillips, 39 N. Y. 351; *post*, § 95.

§ 95. **Wife as husband's agent for necessities.**—Such food, lodging, clothing, attendance, etc., as usually make a part of a wife's life in the station in which her husband allows her to move—such things as enable her to live decently and in a manner fitting her condition and estate—are *necessaries*.<sup>1</sup> She may be amply supplied with such things, or may be in actual need of them; they may be necessities and yet not necessary.<sup>2</sup> A husband may be liable for necessities supplied his wife on his credit<sup>3</sup> by virtue of her agency for him in law or in fact.<sup>4</sup> She is his agent in law when she is without fault and without means, and he refuses or neglects to supply her with them; they must be neces-

saries, she must actually need them, and he must be bound to support her.<sup>5</sup> She is his agent, in fact, when he has so appointed her,<sup>6</sup> and it would seem that it would make no difference whether she were already supplied with articles of the kind or not, unless the party supplying her knew it, or supplied both her needs and the excess himself;<sup>7</sup> for she would be acting apparently within the scope of her authority,<sup>8</sup> which authority depends not on her needs but on her husband's act in holding her out as his agent.<sup>9</sup> Still the fact that necessities were sufficiently supplied by the husband would be relevant to prove that she was not his agent in fact to buy them.<sup>10</sup> A husband usually makes his wife his agent in fact to purchase necessities by putting her at the head of the domestic department of his house, or in charge of his children, or by paying her bills, or accepting the benefit of her orders, or allowing her to use goods bought, knowing that he is expected to pay for them; but all such circumstances are merely facts by which her agency may be proved.<sup>11</sup>

1 Stewart M. & D. §§ 180, 389; 2 Smith, L. C. 404, *et seq.*; Morgan v. Chetwynd, 4 Fost. & F. 451, 459; Raynes v. Bennett, 114 Mass. 424; *post*, § 96.

2 Debenham v. Mellon, Law R. 5 Q. B. D. 394, 397.

3 *Ante*, § 89, n. 38.

4 *Ante*, §§ 82, 89-94.

5 Stewart M. & D. § 180; *ante*, § 64.

6 *Ante*, §§ 89, 90.

7 See Holt v. Brien, 4 Barn. & Adol. 252; Bentley v. Griffin, 5 Taunt. 356.

8 *Ante*, §§ 92, 94.

9 *Ante*, §§ 89-91, 94.

10 See Ruddock v. Marsh, 1 Hurl. & N. 601, 604; *post*, § 97.

11 *Ante*, §§ 89, 90, 94; fully, *post*, § 97.

§ 96. *Authorities as to necessities.*—The decisions as to a husband's liability for necessities are very numerous. Many of them are collected in Stewart on Marriage and Divorce,<sup>1</sup> and in Smith's Leading Cases.<sup>2</sup>

But for further convenience references are here given to leading decisions in England,<sup>3</sup> Alabama,<sup>4</sup> Arkansas,<sup>5</sup> California,<sup>6</sup> Connecticut,<sup>7</sup> Delaware,<sup>8</sup> Georgia,<sup>9</sup> Illinois,<sup>10</sup> Indiana,<sup>11</sup> Iowa,<sup>12</sup> Kansas,<sup>13</sup> Kentucky,<sup>14</sup> Louisiana,<sup>15</sup> Maine,<sup>16</sup> Maryland,<sup>17</sup> Massachusetts,<sup>18</sup> Michigan,<sup>19</sup> Mississippi,<sup>20</sup> Missouri,<sup>21</sup> Nebraska,<sup>22</sup> New Hampshire,<sup>23</sup> New Jersey,<sup>24</sup> New York,<sup>25</sup> North Carolina,<sup>26</sup> Ohio,<sup>27</sup> Pennsylvania,<sup>28</sup> Rhode Island,<sup>29</sup> South Carolina,<sup>30</sup> Tennessee,<sup>31</sup> Texas,<sup>32</sup> Vermont,<sup>33</sup> and Wisconsin.<sup>34</sup>

1 Stewart M. & D. §§ 180, 383, 455.

2 2 Smith, L. C. pp. 404, *et seq.*

3 Debenham v. Mellon, Law R. 2 App. C. 24; 50 Law J. Q. B. D. 155; S. C. Law R. 5 Q. B. D. 394; 49 Law J. Q. B. D. 497; Eastland v. Burchell, Law R. 3 Q. B. D. 432; 47 Law J. Q. B. D. 500, and cases cited in these cases.

4 Pearson v. Durrington, 32 Ala. 227; Cothran v. Lee, 24 Ala. 380; Zeigler v. David, 23 Ala. 129; Hughes v. Chadwick, 6 Ala. 651; Harris v. Davis, 1 Ala. 239.

5 Dunnahoe v. Williams, 24 Ark. 264.

6 Heney v. Sargent, 54 Cal. 396.

7 Kenyon v. Farris, 47 Conn. 510; 36 Am. Rep. 86; St. John v. Bronson, 40 Conn. 75; Shelton v. Hoadley, 15 Conn. 535; Benjamin, 15 Conn. 347; 39 Am. Dec. 384; Rotch v. Miles, 2 Conn. 638.

8 Biddle v. Frazier, 3 Houst. 258; Bennett v. Chamberlain, 5 Har. (Del.) 391; Contine v. Philipps, 5 Har. (Del.) 428; Kemp v. Downhaur, 5 Har. (Del.) 47; Fredd v. Eves, 4 Har. (Del.) 385.

9 Morris v. Root, 65 Ga. 686; Sulter v. Hueston, 50 Ga. 212; Mitchell v. Treanor, 11 Ga. 324; 56 Am. Dec. 421.

10 Wilson v. Bishop, 10 Ill. App. 583; Compton v. Bates, 10 Ill. App. 78; Compton v. Coopers, 10 Ill. App. 86; Schunckle v. Bierman, 89 Ill. 454; Dow v. Eyster, 79 Ill. 251; Gotts v. Clark, 78 Ill. 229; McMillen v. Lee, 78 Ill. 443; Trotter, 77 Ill. 510; Bevier v. Galloway, 71 Ill. 517; Ross, 69 Ill. 569; Rea v. Durkee, 25 Ill. 503; Cornelia v. Ellis, 11 Ill. 584.

11 Mickleberry v. Harvey, 58 Ind. 523; Meiners v. Munson, 53 Ind. 138; Board v. Schmoke, 51 Ind. 416; Oinson v. Heritage, 45 Ind. 73; 15 Am. Rep. 258; Jenkins v. Flinn, 37 Ind. 349; Day v. Wormsley, 33 Ind. 145; Litson v. Brown, 26 Ind. 489.

12 County v. McDonald, 46 Iowa, 170; Porter v. Briggs, 38 Iowa, 165; 18 Am. Rep. 27; Descelles v. Kudmus, 8 Iowa, 51; Reunecken v. Scott, 4 Greene, 185; Johnson v. Williams, 3 Greene, 97.

13 Harttmann v. Tegart, 12 Kan. 177.

14 Bonney v. Reardin, 6 Bush, 34; Rennick v. Ficklin, 5 Mon. B. 166; Henderson v. Stringer, 2 Dana, 291.

15 Johuston v. Pike, 14 La. An. 731; Bowen v. Frindell, 17 La. An. 299.

16 Thorp v. Shapleigh, 67 Me. 235; Burkett v. Trowbridge, 61 Me. 251; Furlong v. Hysom, 35 Me. 332.

17 *Anderson v. Smith*, 33 Md. 465; *Weisker v. Lowenthal*, 31 Md. 413; *Schindel*, 12 Md. 120; *Brown*, 5 Gill, 249; *Addison v. Bowie*, 2 Bland, 619, 626.

18 *Raynes v. Bennett*, 114 Mass. 424; *Mills v. Shirley*, 110 Mass. 159; *Almy v. Wilcox*, 110 Mass. 442; *Eames v. Sweetser*, 101 Mass. 78; *McClellen v. Adams*, 19 Pick. 333; *Wood v. O'Kelley*, 8 Cush. 406.

19 *Clark v. Cox*, 32 Mich. 204.

20 *Cook v. Lyon*, 54 Miss. 368; *Garland*, 50 Miss. 691.

21 *Barr v. Armstrong*, 56 Mo. 577; *Harshaw v. Merryman*, 18 Mo. 106; *Reese v. Chilton*, 26 Mo. 593; *Singleton v. Mason*, 3 Mo. 465; *Bray v. Beard*, 5 Mo. App. 584.

22 *Spaun v. Mercer*, 8 Neb. 357.

23 *Morris v. Palmer*, 39 N. H. 123; *Tebbetts v. Hapgood*, 34 N. H. 420; *Walker v. Leighton*, 31 N. H. 111; *Pickering*, 6 N. H. 120.

24 *Wilson v. Herbert*, 41 N. J. L. 454; 32 Am. Rep. 243; *Snover v. Blair*, 25 N. J. L. 94; *Sterling*, 5 N. J. L. 773.

25 *Catlin v. Martin*, 60 N. Y. 393; *Keller v. Phillips*, 39 N. Y. 351; *People v. Pettit*, 74 N. Y. 320; *Cromwell v. Benjamin*, 41 Barb. 558; *Johnston v. Allen*, 39 How. Pr. 506; *Allen*, 9 Daly, 198; *Webber v. Spahnake*, 2 Redf. 258; *Thercoot v. Bagioli*, 9 Bosw. 578; *Church v. Landers*, 10 Wend. 79.

26 *Pool v. Everton*, 5 Jones, 241.

27 *Hare v. Gibson*, 32 Ohio St. 33; 30 Am. Rep. 563.

28 *Rigoney v. Neiman*, 73 Pa. St. 370; *Hultz v. Gibbs*, 66 Pa. St. 360; *Breinig v. Meitzler*, 23 Pa. St. 156; *Alexander v. Miller*, 16 Pa. St. 215; *Cunningham v. Irwin*, 7 Serg. & R. 247; 10 Am. Dec. 458; *Reakert v. Sanford*, 5 Watts & S. 161; *Markley v. Wartman*, 9 Phila. 226; *McKinley v. McGregor*, 3 Whart. 369.

29 *Graham v. Coupe*, 9 R. I. 478; *Gill v. Read*, 5 R. I. 343.

30 *Clement v. Mattison*, 3 Rich. 93; *Moses v. Fogartie*, 2 Hill, 325; *Williams v. Prince*, 3 Strob. 410.

31 *Brown v. Patton*, 3 Humph. 135.

32 *Black v. Bryan*, 18 Tex. 453; *Morgan v. Hughes*, 20 Tex. 141; *Payne v. Bentley*, 21 Tex. 452.

33 *Thorne v. Kathan*, 51 Vt. 520; *Roberts v. Kelley*, 51 Vt. 97; *Bugbee v. Blood*, 48 Vt. 499; *Woodward v. Barnes*, 43 Vt. 330; 46 Vt. 332; 14 Am. Rep. 626; *Spencer v. Storrs*, 38 Vt. 156; *Carter v. Howard*, 39 Vt. 106; *Meador v. Page*, 39 Vt. 306; *Sawyer v. Cutting*, 23 Vt. 486; *Felker v. Emerson*, 16 Vt. 653; *Day v. Burnham*, 36 Vt. 37; *Gilman v. Andrus*, 28 Vt. 241.

34 *Brown v. Warden*, 39 Wis. 432; *Butts v. Newton*, 29 Wis. 632; *Sturtevant v. Starin*, 18 Wis. 608; *Birdsall v. Dunn*, 16 Wis. 235.

§ 97. **Proof of wife's agency for husband.**—Except in one case,<sup>1</sup> agency of wife for husband is a mere question of fact,<sup>2</sup> provable as any other fact<sup>3</sup> by any evidence showing her appointment in one of the several modes.<sup>4</sup> The burden of proof is on the party alleging the agency.<sup>5</sup> The wife cannot testify as to the fact of

her agency,<sup>6</sup> though that fact being proved her declarations as his agent bind him.<sup>7</sup> The fact that a woman is bearing his name is no evidence that she is his agent,<sup>8</sup> but a woman's agency for him being shown the fact that she is his wife or is treated as such,<sup>9</sup> is relevant to determine the scope of her agency.<sup>10</sup> More particularly, —

1. *Business agency.*<sup>11</sup> If husband and wife live together and she transact business, the presumption is that she is his agent.<sup>12</sup> Evidence that she was seen several times in his counting-room apparently transacting his business justifies a finding that she was his business agent,<sup>13</sup> so does proof of the fact that he went away and left her in charge of his business.<sup>14</sup>

2. *Domestic agency.*<sup>15</sup> Proof that a man and woman are cohabiting as husband and wife raises a presumption<sup>16</sup> which may be rebutted<sup>17</sup> that she is his manager,<sup>18</sup> his domestic agent to buy necessities, etc.,<sup>19</sup> but further facts showing that he authorized, assented to, or ratified her acts, must be proved to establish her agency if they are living apart,<sup>20</sup> or the articles are not necessities,<sup>21</sup> or the presumption from cohabitation is rebutted.<sup>22</sup> So that if the parties are living apart the proof of their marriage raises no presumption of agency, but the party alleging it must establish its existence in law<sup>23</sup> or in fact.<sup>24</sup> The usual evidence in these cases is of previous payment by the husband of the wife's bills,<sup>25</sup> his acceptance of the benefit of her acts,<sup>26</sup> or his permitting her to keep goods he knows he is expected to pay for.<sup>27</sup> The fact that he paid for articles ordered for domestic use is evidence of her authority to have him charged for the education of their child.<sup>28</sup> The mere entry of charges as against her is not conclusive that credit was not given to him.<sup>29</sup>

1 Stewart M. & D. § 180; ante, §§ 89, 90.

- 2 Debenham v. Mellon, Law R. 6 App. C. 24, 32; Law R. 5 Q. B. D. 394, 400, 402; *ante*, § 89, n. 6.
- 3 Brander v. Cobb, 2 La. An. 336; McKee v. Kent, 24 Miss. 131; Hughes v. Mulbey, 1 Sand. 92; Cox v. Hoffman, 4 Dev. & B. 180; Abbott v. Mackinley, 2 Miles, 220; McKinley v. McGregor, 3 Whart. 369; Gray v. Otis, 11 Vt. 625.
- 4 *Ante*, §§ 89, 90.
- 5 Benjamin, 15 Conn. 347, 354; 39 Am. Dec. 384; Savage v. Davis, 18 Wis. 603, 614.
- 6 Barr v. Armstrong, 56 Mo. 577, 583; Butts v. Newton, 39 Wis. 632, 641; *ante*, § 56.
- 7 Singleton v. Mann, 3 Mo. 323, 325; Pickering, 6 N. H. 120, 124; *ante*, § 56.
- 8 Goneme v. Franklin, 1 Fost. & F. 465.
- 9 *Ante*, § 94.
- 10 Benjamin, 15 Conn. 349, 355; 39 Am. Dec. 384; Furman v. Chicago, 62 Iowa, 395, 398, 399; *ante*, §§ 92-95.
- 11 *Ante*, § 93.
- 12 McKinley v. McGregor, 3 Whart. 369; *ante*, § 93.
- 13 Plummer v. Sills, 3 Nev. & M. 422; *ante*, § 93.
- 14 Rotch v. Miles, 2 Conn. 633, 645.
- 15 *Ante*, § 94.
- 16 Debenham v. Mellon, Law R. 5 Q. B. D. 394, 402; Clifford v. Laton, 3 Car. & P. 15, 16; Reneaux v. Teakle, 8 Ex. 680; Tebbits v. Hapgood, 34 N. H. 420; *ante*, § 94.
- 17 Debenham v. Mellon, Law R. 6 App. C. 21, 32, 37; Jolly v. Rees, 15 Com. B. N. S. 623; *ante*, § 94; *post*, § 95.
- 18 Debenham v. Mellon, Law R. 6 App. C. 24, 26.
- 19 *Ante*, §§ 94, 95.
- 20 Jenner v. Hill, 1 Fost. & F. 263; Johnston v. Sumner, 3 Hurl. & N. 261, 266; Mitchell v. Treanor, 11 Ga. 324; 53 Am. Dec. 421; Reg. v. Durkee, 25 Ill. 503; Mott v. Comstock, 8 Wend. 544; Pool v. Everton, 5 Jones, 241; Cany v. Patton, 2 Ashm. 140; Walker v. Simpson, 7 Watts & S. 83; 42 Am. Dec. 216; Mickelberry v. Harvey, 58 Ind. 523, 525.
- 21 Harrison v. Grady, 12 Jur. N. S. 140; Phlllipson v. Hoyter, Law R. 6 Com. P. 38; Freestone v. Butcher, 9 Car. & P. 643, 645.
- 22 Barr v. Armstrong, 56 Mo. 577, 583.
- 23 Clifford v. Laton, 3 Car. & P. 15, 16; Mainwaring v. Leslie, 2 Car. & P. 507; Edwards v. Towles, 5 Man. & G. 624; Bird v. Jones, 3 Man. & R. 121; Hardie v. Grant, 8 Car. & P. 512.
- 24 Mickelberry v. Harvey, 58 Ind. 523, 525; *infra*, n. 20.
- 25 Rennick v. Ficklin, 5 Mon. B. 166.
- 26 Walthman v. Wakefield, 1 Camp. 120, 121; *ante*, § 89.
- 27 Morgan v. Chetwynd, 4 Fost. & F. 451, 459.
- 28 McGeorge v. Egan, 7 Scott, 422.
- 29 Godfrey v. Brooks, 5 Har. (Del.) 396; Furlong v. Hysom, 35 Me. 332; *ante*, § 89, n. 38.

## § 98. Determination of wife's agency for husband.—

1. *Agency in fact.* A wife's agency in fact to act for her husband determines when he becomes insane<sup>1</sup> or dies,<sup>2</sup> and when he revokes it.<sup>3</sup> He may revoke it (1) by giving notice to third parties not to deal with her on his credit.<sup>4</sup> This notice is not generally necessary,<sup>5</sup> but if it is necessary it must be actual<sup>6</sup>—a general newspaper advertisement, for example, is no notice to one who does not see it.<sup>7</sup> (2) By prohibiting her from acting as his agent.<sup>8</sup> Such prohibition is effectual whether it be known to the parties with whom she deals or not;<sup>9</sup> still, if her husband continues to allow her to act as his agent he is estopped from setting up a private prohibition;<sup>10</sup> and he must give actual notice of the prohibition to all persons with whom he has previously allowed her to deal as his agent.<sup>11</sup> This prohibition must be clear and definite,<sup>12</sup> but it may be inferable from circumstances,<sup>13</sup> as when he himself assumes complete control of the household,<sup>14</sup> or when they break up housekeeping.<sup>15</sup> So giving the wife an allowance may be a revocation of her authority to pledge his credit,<sup>16</sup> but not unless it appears that it was meant to have this effect.<sup>17</sup> When a wife's agency in fact is revoked, her agency in law may nevertheless remain.<sup>18</sup>

2. *Agency in law.* A wife's agency in law to act for her husband determines when he dies,<sup>19</sup> but not when he becomes insane;<sup>20</sup> nor can he by any act of his, such as notice not to trust her,<sup>21</sup> destroy it.<sup>22</sup>

1. *Alexander v. Miller*, 16 Pa. St. 215, 219, 220. See *Davis v. Merrill*, 47 N. H. 208, 211.

2. *Blades v. Free*, 9 Barn. & C. 167, 170; *Smout v. Ilberry*, 10 Mees. & W. 1; *Stinson v. Prescott*, 15 Gray, 335, 337; *Ginochio v. Porcella*, 3 Bradf. 277.

3. Like any other agency in fact. Consult *Ewells Evans Ag.* pp. 76, *et seq.*

4. *Barr v. Armstrong*, 56 Mo. 577, 581; *Daubney v. Hughes*, 60 N. Y. 187, 189. See *Monson v. Williams*, 6 Gray, 416; *Rumney v. Keyes*, 7 N. H. 571; *Conir v. Hildebrand*, 1 Ind. 555; *Walker v. Leighton*, 31 N. H.



111; *McCutchen v. McGahay*, 11 Johns. 281; 6 Am. Dec. 373; *Keller v. Phillips*, 39 N. Y. 251; *Ogden v. Prentice*, 33 Barb. 160; *Cromwell v. Benjamin*, 41 Barb. 553.

5 *Infra*, n. 9.

6 See *Ewell's Evans Ag.* p. 434.

7 *Woodward v. Barnes*, 43 Vt. 330, 334; 46 Vt. 322; 14 Am. Rep. 626.

8 *Morgan v. Chetwynd*, 4 Fost. & F. 451, 458; *Debenham v. Mellon*, Law R. 5 Q. B. D. 394, 402; Law R. 6 App. C. 24, 33; *Clark v. Cox*, 32 Mich. 204, 213; *Woodward v. Barnes*, 43 Vt. 330, 334; 14 Am. Rep. 626.

9 *Debenham v. Mellon*, Law R. 6 App. C. 24, 32; Law R. 5 Q. B. D. 394, 399, 403; *Jolly v. Rees*, 15 Com. B. N. S. 623; *Mizen v. Pick*, 3 Mees. & W. 481.

10 *Debenham v. Mellon*, Law R. 6 App. C. 21, 33; *ante*, § 89.

11 *Wallis v. Beddick*, 22 Week. R. 1; *Debenham v. Mellon*, Law R. 5 Q. B. D. 394, 403; *Daubney v. Hughes*, 60 N. Y. 137, 191; *Cony v. Patton*, 2 Ashm. 140.

12 *Morgan v. Chetwynd*, 4 Fost. & F. 451, 453.

13 *Ante*, § 97.

14 Consult *ante*, § 94.

15 See *Edwards v. Towels*, 6 Scott N. R. 641; *Bird v. Jones*, 3 Man. & R. 121.

16 See *Seaton v. Benedict*, 5 Bing. 23; *Holt v. Brien*, 4 Barn. & Ald. 252; *Dennys v. Sargeant*, 6 Car. & P. 419; *Mizen v. Pick*, 3 Mees. & W. 481.

17 See *Ruddock v. Marsh*, 1 Hurl. & N. 601, 604; *ante*, § 95.

18 *Woodward v. Barnes*, 43 Vt. 330, 334.

19 *Supra*, n. 2. Consult *ante*, § 64; *Stewart M. & D.* §§ 180, 452, 459.

20 *Richardson v. Dubois*, Law R. 5 Q. B. 51, 53; *Read v. Legard*, 6 Ex. 637; *Alexander v. Miller*, 16 Pa. St. 215, 220; *ante*, § 64.

21 *Harris v. Morris*, 4 Esp. 41, 42.

22 *Stewart M. & D.* § 180.

## CHAPTER VI.

### POSTNUPTIAL SETTLEMENTS—DEALINGS.

ART. I. IN GENERAL, §§ 99-101

II. FORM, §§ 102, 103.

III. CONSIDERATION, §§ 104-108.

IV. FRAUD, §§ 109-112.

V. CREDITOR'S RIGHTS, §§ 113-118.

VI. POSSESSION, §§ 119-121.

VII. REMEDIES, §§ 122-124.

VIII. PARTICULAR KINDS OF, §§ 125-134.

#### ARTICLE I.—POSTNUPTIAL SETTLEMENTS IN GENERAL.

§ 99. Term "postnuptial settlement" defined.

§ 100. Valid, void, and voidable settlements.

§ 101. On what validity depends.

§ 99. Term "postnuptial settlement" defined.—The term "postnuptial settlement," as used in this chapter, includes all transfers of property, direct or indirect, between husband and wife. (Art. viii.) The party from whom the property passes is called the *settlor*; the party to whom, the *settlee*.

§ 100. Valid, void, and voidable settlements.—A postnuptial settlement may be wholly valid as to all the world, or partly valid and partly invalid. Thus, postnuptial settlements are usually valid between the parties;<sup>1</sup> one may be binding on the settlor,<sup>2</sup> his heirs and representatives,<sup>3</sup> and his voluntary assignees,<sup>4</sup> but invalid as against his creditors;<sup>5</sup> valid as to some (subsequent) creditors,<sup>6</sup> but invalid as to others (existing) creditors;<sup>7</sup> valid as to part of the property settled, but invalid as to the rest;<sup>8</sup> invalid as an absolute grant but

valid as a security.<sup>9</sup> Whether a settlement is, when it is valid between the parties, but otherwise invalid, void, or voidable, does not seem to be clearly determined.<sup>10</sup> Though "void" is usually the word used,<sup>11</sup> the better opinion seems to be that it is voidable only.<sup>12</sup> For a *bona fide* purchaser for value from a settlee whose title is invalid against creditors, gets a valid title even against such creditors,<sup>13</sup> which could not be the case if the original settlement was absolutely void against them;<sup>14</sup> and this is true of both realty<sup>15</sup> and personality;<sup>16</sup> so property previously conveyed in fraud of creditors does not pass by a deed from the settlor for the benefit of such creditors;<sup>17</sup> so, only a creditor can allege the invalidity of the settlement.<sup>18</sup> The reason the word "void" is so often used is that in the great mass of cases no special proceeding need be resorted to to have a settlement declared void, but the question of validity may be determined in any proceeding at law or in equity to which both the settlor and settlee or their respective successors are parties.<sup>19</sup>

1 Cushwa, 5 Md. 44, 50; *post*, §§ 104, 115, 123.

2 Garner v. Gravy, 54 Ind. 183, 192.

3 Jones v. Obenchalu, 10 Gratt. 259, 267.

4 Rogers v. Fales, 5 Pa. St. 154, 158.

5 Niller v. Johnson, 27 Md. 611; *post*, §§ 113-118.

6 Plummer v. Jarmon, 44 Md. 632, 639; *post*, § 117.

7 Crooks, 34 Ohio St. 610, 615; *post*, § 116.

8 Farmers v. Long, 7 Bush, 337, 340; Wickes v. Clarke, 8 Paige, 161, 172; *post*, § 106.

9 Herschfeldt v. George, 6 Mich. 456, 468; *post*, §§ 106, 132.

10 See Bump Fraud. Convey. ch. xvi.; *post*, § 114.

11 Holland v. Croft, 20 Pick. 321, 338; Schumann v. Peddicord, 50 Md. 560, 563; Mulford v. Peterson, 35 N. J. L. 127, 132.

12 Anderson v. Roberts, 18 Johns. 515, 527; 9 Am. Dec. 235.

13 Bean v. Smith, 2 Mason, 252, 272; Eldred v. Drake, 43 Iowa, 569, 570; Oriental Bk. v. Haskins, 3 Met. 332, 340; 37 Am. Dec. 140; Farmers v. Brooke, 40 Md. 249, 257; Phelps v. Morrison, 24 N. J. Eq. 196, 198, 199; Anderson v. Roberts, 18 Johns. 515, 525, 530; 9 Am. Dec. 235. Not of course in case of notice: Green v. Early, 39 Md. 223, 229.

14 See Levi v. Booth, 58 Md. 305, 311.

- 15 *Eldred v. Drake*, 43 Iowa, 569, 570.
- 16 *Farmers v. Brooke*, 40 Md. 240, 257.
- 17 *Scheffer v. Seltz*, Md. Law Rec. Mar. 22, 1884.
- 18 *Cushwa*, 5 Md. 44, 50; *post*, § 123.
- 19 *Post*, REMEDIES, §§ 122-124.

§ 101. On what the validity of postnuptial settlements depends.—The validity of a postnuptial settlement depends or may depend on, (1) the capacity of husband and wife to contract together; (2) the form of the settlement; (3) the consideration; (4) the absence of fraud or duress; (5) the rights of third parties standing in the position of creditors. The capacity of parties has already been discussed (sections 40-46); the other above-mentioned topics are treated in this chapter (articles ii.-v.).

## ARTICLE II.—FORM OF POSTNUPTIAL SETTLEMENTS.

§ 102. When formalities are necessary.

§ 103. Various forms of settlements.

§ 102. When formalities are necessary.—In some States all transfers of property between husband and wife must be recorded,<sup>1</sup> or ratified by a court;<sup>2</sup> in others, a wife must file a statement of all her separate property of which her husband has possession;<sup>3</sup> and generally a married woman cannot release her marriage rights except by writing or deed.<sup>4</sup> But acts requiring record of marriage settlements apply only to those in consideration of marriage,<sup>5</sup> not to postnuptial settlements.<sup>6</sup> Otherwise the formalities are the same as in transfers between strangers.<sup>7</sup>

1 *Teague v. Downs*, 79 N. C. 230, 237; *Lewis v. Caperton*, 8 Gratt. 145, 165.

2 *Bowman v. Kaufman*, 30 La. An. 1021, 1025; *Keller v. Ruiz*, 21 La. An. 283; *Atkinson*, 15 La. An. 491, 492.

3 *Smith v. Hewett*, 13 Iowa, 94, 96; *Jones*, 19 Iowa, 226, 239, 240; *post*, §§ 120, 121.

4 Randles, 63 Ind. 93, 100; *post*, §§ 270-272.

5 Stewart M. & D. §§ 34-36. •

6 Banks v. Brown, 2 Hill Ch. 558, 565; 30 Am. Dec. 380; overruling Price v. White, 1 Bail. Ch. 244, 263.

7 As to desirability of formalities, see *post*, §§ 120, 121.

§ 103. Various forms of postnuptial settlement.—Postnuptial settlements may be formal or informal, and in their various forms are hereinafter particularly discussed (article viii.).

### ARTICLE III.—CONSIDERATION IN POSTNUPTIAL SETTLEMENTS.

§ 104. Necessity of consideration.

§ 105. Kinds of consideration.

§ 106. Adequacy of consideration.

§ 107. Effect of consideration.

§ 108. Miscellaneous points as to consideration.

§ 104. Necessity of consideration in postnuptial settlements.—A consideration is necessary to render an executory contract enforceable, whether at law<sup>1</sup> or in equity,<sup>2</sup> and to render an executed settlement valid as against creditors;<sup>3</sup> but voluntary settlements or executed gifts are binding between the parties.<sup>4</sup> A voluntary settlement is one without consideration.<sup>5</sup> The word "consideration" used alone means, in this article, consideration recognized by law—that is to say, *valuable* or *real* consideration.<sup>6</sup>

1 1 Parsons Cont. 427; *infra*, n. 2.

2 Crooks, 34 Ohio St. 610, 615. No gift good without delivery: *Post*, §§ 120, 127.

3 Sexton v. Wheaton, 8 Wheat. 229; 1 Am. L. C. 171; *post*, §§ 109, 113-118. As to scope of word "creditors," see *post*, § 115.

4 Plummer v. Jarman, 41 Md. 632, 637; Peirce v. Thompson, 17 Pick. 391, 393; Wilder v. Brooks, 10 Minn. 50, 54; Reid v. Gray, 37 Pa. St. 508, 510; *post*, §§ 124, 127.

5 *Post*, §§ 105-107.

6 *Post*, § 105.

§ 105. Kinds of consideration in postnuptial settlements. — Postnuptial settlements are made in consideration of love and affection, or of some valuable thing, or of some nominal thing.

1. *Love and affection.* “Love and affection” is a meritorious consideration:<sup>1</sup> it serves often to explain a grantor’s purpose and to disprove a fraudulent intent;<sup>2</sup> it is a good consideration as against the grantor and his representatives;<sup>3</sup> but it is not a valuable consideration, it will not sustain an executory contract at all,<sup>5</sup> or a settlement in prejudice of the rights of creditors.<sup>6</sup> Existing marriage is a consideration of the same kind;<sup>7</sup> as is a husband’s desire to make provision for the support he owes<sup>8</sup> his wife.<sup>9</sup>

2. *Valuable consideration.* Each of the following is a valuable consideration: A release of dower,<sup>10</sup> or homestead,<sup>11</sup> or previous settlement,<sup>12</sup> or separate property rights;<sup>13</sup> an antenuptial enforceable promise to make a settlement;<sup>14</sup> an existing debt<sup>15</sup> though barred by limitations;<sup>16</sup> a wife’s equity of settlement;<sup>17</sup> use of property with understanding that it should be replaced;<sup>18</sup> cash received as a loan;<sup>19</sup> rents collected as agent;<sup>20</sup> wife’s right of survivorship in mortgage to her.<sup>21</sup> It is a valuable consideration for a settlement that a court of equity would have compelled its execution.<sup>22</sup> If husband and wife, each of them having interests, no matter how much, or of what degree, or of what quality, come to an agreement which is afterwards embodied in a settlement, it is a bargain and a transaction on valuable consideration.<sup>23</sup>

3. *Nominal consideration.* Each of the following is a mere nominal consideration — really no consideration at all: The wife’s property which by law is the husband’s;<sup>24</sup> dower previously voluntarily released;<sup>25</sup> property previously voluntarily given up;<sup>26</sup> cohabita-

tion, when this is a duty;<sup>27</sup> the wife's services, when these belong to her husband.<sup>28</sup>

1 *McMillan v. Peacock*, 57 Ala. 127, 129; *Clayton v. Brown*, 17 Ga. 217, 220; *Majors v. Everton*, 89 Ill. 56, 57; 31 Am. Rep. 65; *Horder*, 23 Kan. 391, 392; *Orr*, 8 Bush, 156, 159; *Todd v. Wickliff*, 18 Mon. B. 866, 906; *Worthington v. Bullitt*, 6 Md. 172, 198; *Peirce v. Thompson*, 17 Pick. 391, 393; *Wells v. Treadwell*, 28 Miss. 717, 726; *Whitaker*, 52 N. Y. 368, 371; 11 Am. Rep. 711.

2 *Wells v. Treadwell*, 28 Miss. 717, 726.

3 *Orr*, 8 Bush, 156, 159; *Peirce v. Thompson*, 17 Pick. 391, 393.

4 *Clayton v. Brown*, 17 Ga. 217, 220; *supra*, n. 1.

5 *Whitaker*, 52 N. Y. 368, 371; 11 Am. Rep. 711.

6 *Clayton v. Brown*, 17 Ga. 217, 220; *supra*, n. 1.

7 *Lloyd v. Fulton*, 91 U. S. 479, 485; *Simpson v. Graves*, *Riley Eq.* 232; *Stewart M. & D.* §§ 33, 473.

8 *Ante*, § 64.

9 *Dale v. Lincoln*, 62 Ill. 22, 26; *Herschfeldt v. George*, 6 Mich. 456, 465; *Wilder v. Brooks*, 10 Minn. 50, 54; *Crooks*, 34 Ohio St. 610, 615; *Jones v. Obenchain*, 10 Gratt. 259, 262. Consult *ante*, § 87.

10 *Sykes v. Chadwick*, 18 Wall. 141; *Hoot v. Sorrell*, 11 Ala. 386, 400; *Nalle v. Lively*, 15 Fla. 130; *Sedgwick v. Tucker*, 90 Ind. 271, 277; *Brown v. Rawlings*, 72 Ind. 505; *Randles*, 63 Ind. 93; *Hollowell v. Simonson*, 21 Ind. 398, 400; *Unger v. Price*, 9 Md. 552; *Bullard v. Briggs*, 7 Pick. 533, 538; 19 Am. Dec. 292; *Ward v. Crotty*, 4 Met. 59; *Randall*, 37 Mich. 563, 572; *Woodson v. Pool*, 19 Mo. 340, 344; *Garlick v. Strong*, 3 Paige, 440; *Searing*, 9 Paige, 283; *Kelly v. Case*, 18 Hun, 472, 474; *Duffy v. Insurance*, 8 Watts & S. 413, 434; *Banks v. Brown*, *Riley Ch.* 131, 135; 30 Am. Dec. 380; *Payne v. Hutcheson*, 32 Gratt. 812.

11 *Sproul v. Atchison*, 22 Kan. 336, 340; *Keyes v. Rines*, 37 Vt. 260, 264.

12 *Phila. v. Riddle*, 25 Pa. St. 259, 262.

13 *Worthington v. Farber*, 52 Ala. 45, 47; *Maraman*, 4 Met. (Ky.) 84, 89; *Drury v. Briscoe*, 42 Md. 154, 162; *Teller v. Bishop*, 8 Minn. 226, 228; *Butterfield v. Stanton*, 44 Miss. 15, 35; *Glicker v. Martin*, 50 Pa. St. 138, 140, 141; *Pfeiffer v. Lytle*, 58 Pa. St. 386, 391; *Ready v. Bragg*, 1 Head, 511, 515; *Williams v. Powell*, 12 Gratt. 372, 385; *Rose v. Brown*, 11 W. Va. 122, 136; *Wochoska*, 45 Wis. 423, 426.

14 *Stewart M. & D.* § 33. See *Mechanics v. Taylor*, 2 Cranch C. C. 507; *Andrews v. Jones*, 10 Ala. 401, 421; *Harper v. Scott*, 12 Ga. 125; *Lyne v. Bank*, 5 Marsh. J. J. 545, 552; *Belford v. Crane*, 16 N. J. Eq. 265, 271; *Reade v. Livingston*, 3 Johns. Ch. 481, 488; 8 Am. Dec. 520; *Saunders v. Ferrill*, 1 Ired. 97, 102; *Caines v. Marley*, 2 Yerg. 582, 588.

15 *Wilson v. Sheppard*, 28 Ala. 623, 629; *Jones v. Brandt*, 69 Iowa, 332, 347; *Latimer v. Glenn*, 2 Bush, 535, 541; *Lehman v. Levy*, 30 La. An. 745, 750; *Pfeiffer v. Lytle*, 58 Pa. St. 386, 391; *ante*, § 45.

16 *French v. Mothy*, 63 Me. 326, 328.

17 *Montefiore v. Behrens*, *Law R.* 1 Eq. 171; *Bradford v. Goldsborough*, 15 Ala. 311, 315; *McCauley v. Rodes*, 7 Mon. B. 462; *McClanahan v. Beasley*, 17 Mon. B. 111, 114; *Oswald v. Hoover*, 43 Md. 360, 369; *Stockett v. Holliday*, 9 Md. 480, 498; *Partridge v. Havens*, 10 Paige, 618, 624, 625; *Walden*, 33 Gratt. 83, 95, 96; *Poindexter v. Jeffries*, 15 Gratt. 363, 373.

- 18 *Butterfield v. Stanton*, 44 Miss. 15, 35.
- 19 *Teller v. Bishop*, 8 Minn. 226, 228.
- 20 *Barker v. Morrill*, 55 Ga. 332, 334.
- 21 *Stockett v. Holliday*, 9 Md. 480, 493.
- 22 *Wykes v. Clarke*, 8 Paige, 171, 172; *Poindexter v. Jeffries*, 15 Gratt. 363, 373; *Putnam v. Bicknell*, 18 Wis. 333, 337.
- 23 *Teasdale v. Braithwaite*, Law R. 4 Ch. D. 85, 90, 46 Law J. Ch. 396.
- 24 *Ream v. Karnes*, 90 Ind. 167, 172; *Buchanan v. Lee*, 69 Ind. 117; *Bayne v. State*, Md. Law Rec. Aug. 23, 1884; *Oswald v. Hoover*, 43 Md. 360, 368; *Plummer v. Jarman*, 44 Md. 632, 637; *Peirce v. Thompson*, 17 Pick. 391, 393; *Gicker v. Martin*, 50 Pa. St. 133, 141.
- 25 *Woodson v. Pool*, 19 Mo. 340, 344.
- 26 *Whittlesy v. McMahon*, 19 Conn. 138; 26 Am. Dec. 382; *Lyne v. Bank* 5 Marsh. J. J. 545, 552; *Sabel v. Slingluff*, 52 Md. 132, 134; *Kuhn v. Stansfield*, 28 Md. 210, 216; *Terry v. Wilson*, 63 Mo. 493, 499; *Woodson v. Pool*, 19 Mo. 340, 344; *Clark v. Rosekraus*, 31 N. J. Eq. 665, 667; *Johnston*, 31 Pa. St. 450, 454; *Perkins*, 1 Tenn. Ch. 537; *Cheatam v. Hess*, 2 Tenn. Ch. 763.
- 27 *Ante*, § 59.
- 28 *Belford v. Crane*, 16 N. J. Eq. 265, 271; *ante*, § 65.

§ 106. Adequacy of consideration in marriage settlements. — As a general rule, if a consideration is real (valuable) its adequacy is not inquired into.<sup>1</sup> But inadequacy of consideration is evidence of fraud.<sup>2</sup> And as against creditors the consideration for a settlement must be fair and reasonable,<sup>3</sup> the payment of a trivial sum,<sup>4</sup> or such a disproportionate consideration as two hundred and seventy dollars, for property worth two thousand dollars,<sup>5</sup> or four hundred dollars for property worth eighteen hundred dollars,<sup>6</sup> will not defeat creditors' rights;<sup>7</sup> as to them the settlement is voluntary to the extent of the excess;<sup>8</sup> and though if the settlee has acted in good faith he or she will be protected as a creditor,<sup>9</sup> and the settlement treated as a security for the actual consideration,<sup>10</sup> in the case of bad faith he or she will not be protected at all.<sup>11</sup>

1 *Hoot v. Sorrell*, 11 Ala. 387, 400; *Drury v. Briscoe*, 42 Md. 154, 163; *Duffy v. Insurance*, 8 Watts & S. 413, 435; *Banks v. Brown*, Riley Ch. 131, 138; 30 Am. Dec. 380; *Taylor v. Executor*, 4 Desans. Eq. 227, 231. See *Anson, Contracts*, p. 63; *Parsons, Contracts*, 429; *Lawrence v. McCalmont*, 2 How. 426; *Follett v. Rose*, 3 McLean, 32; *Stewart v. State*, 2 Har. & G. 114; *Hubbard v. Coolidge*, 1 Met. 84; *Knobb v.*



Lindsey, 5 Ohio, 471 ; Goree v. Wilson, 1 Bail. 597 ; Brachan v. Griffin, 3 Call, 433 ; Kidder v. Chamberlain, 41 Vt. 62. But see Schnell v. Nell, 17 Ind. 29 ; Bailey v. Day, 26 Me. 88.

2 Goff v. Rogers, 71 Ind. 459, 461 ; *post*, § 112.

3 Hollowell v. Simonson, 21 Ind. 398, 400 ; Bullard v. Briggs, 7 Pick. 533, 538 ; 19 Am. Dec. 292.

4 Worthington v. Bullitt, 6 Md. 172, 198 ; Den v. York, 13 Ired. 206, 211.

5 Peigne v. Snowden, 1 Desaus. Eq. 591, 592.

6 Herschfeldt v. George, 6 Mich. 456, 468. Five thousand dollars for twenty thousand dollars : Worthington v. Bullitt, 6 Md. 172, 198.

7 See Farmers v. Long, 7 Bush, 377, 340 ; Bowie v. Stonestreet, 6 Md. 418, 433 ; Worthington v. Bullitt, 6 Md. 172, 198 ; Henkle v. Wilson, 53 Md. 287, 294 ; Bullard v. Briggs, 7 Pick. 533, 538 ; 19 Am. Dec. 292 ; Herschfeldt v. George, 6 Mich. 456, 468 ; Hill v. Bugg, 52 Miss. 397, 402 ; Kelley v. Case, 18 Hun, 472, 474 ; Den v. York, 13 Ired. 206, 210 ; Peigne v. Snowden, 1 Desaus. Eq. 591, 592 ; Johnston v. Gill, 27 Gratt. 587, 591 ; Davis, 25 Gratt. 587, 596 ; William v. Powell, 12 Gratt. 372, 384 ; Warren v. Ranney, 50 Vt. 655, 656.

8 Johnston v. Gill, 27 Gratt. 587, 591.

9 Davis, 25 Gratt. 587, 593 ; William v. Powell, 12 Gratt. 372, 385 ; *infra*, n. 10.

10 Hinkle v. Wilson, 53 Md. 287, 294 ; Herschfeldt v. George, 6 Mich. 456, 468 ; *supra*, n. 9.

11 Warren v. Ranney, 50 Vt. 655, 656 ; *post*, § 107.

## § 107. Effect of consideration in postnuptial settlements.

—A consideration changes the character of a transaction and makes it a bargain instead of a gift.<sup>1</sup> But when a settlement is actually intended to hinder, delay, or defraud creditors,<sup>2</sup> the settlee sharing in this intent,<sup>3</sup> it is, under the statutes,<sup>4</sup> void as to them, though made upon valuable consideration.<sup>5</sup> On the other hand, though a settlement is originally fraudulent in fact or in law,<sup>6</sup> a *bona fide* assignee of the settlee without notice<sup>7</sup> gets a good title if the assignment is on valuable consideration.<sup>8</sup> So it is said a valuable consideration may be subsequently given and yet sustain the settlement.<sup>9</sup> The most important effect of an adequate valuable consideration is that it excludes the presumption of fraud in law.<sup>10</sup>

1 Teasdale v. Braithwaite, Law R. 4 Ch. D. 85, 90 ; 46 Law J. Ch. 396.

2 *Post*, §§ 109, 111, 113-117.

- 3 *Prewit v. Wilson*, 103 U. S. 22, 23, 24; *post*, § 111.
- 4 *Post*, § 114.
- 5 *Pomeroy v. Bailey*, 43 N. H. 118, 120; *Metropolitan v. Durant*, 22 N. J. Eq. 35, 42; *ante*, § 105.
- 6 *Post*, § 109.
- 7 *Green v. Early*, 39 Md. 223, 229, 230.
- 8 *Eldred v. Drake*, 43 Iowa, 567, 570; *ante*, § 100.
- 9 *Bank v. Brown*, 2 Hill Ch. 558, 563; 30 Am. Dec. 380.
- 10 *Post*, §§ 109, 114.

§ 108. Miscellaneous points as to consideration in post-nuptial settlements.—A quit-claim deed is presumed to be without consideration.<sup>1</sup> The consideration stated in a deed is *prima facie* the actual consideration as between the parties and their privies,<sup>2</sup> but not as against creditors.<sup>3</sup> If a consideration is expressed in a written contract no different one may be proved.<sup>4</sup> Love and affection being alleged, a valuable consideration cannot be proved,<sup>5</sup> though the contrary is held in one case;<sup>6</sup> nor can the settlee's broken promises to treat the settlor kindly, in an application to set the settlement aside.<sup>7</sup> But under "divers good causes and considerations" love and affection may be proved,<sup>8</sup> or some valuable consideration.<sup>9</sup> The phrase "good consideration" in the Alabama statute is construed to include "valuable consideration."<sup>10</sup>

1 *Loomis v. Brush*, 36 Mich. 40, 47.

2 *Mayfield v. Kilgour*, 31 Md. 240, 245.

3 *Williams v. Powell*, 12 Gratt. 372, 281; *Mulford v. Peterson*, 35 N. J. L. 127, 134, 135.

4 See 1 *Parsons Cont.* 429, 430; *Veacock v. McCall*, Gilp. 320; *Emery v. Chase*, 5 Me. 232; *Schermerhorn v. Vanderheyden*, 1 Johns. 139; 3 Am. Dec. 304.

5 *Mayfield v. Kilgour*, 3 Md. 240, 246.

6 *Bank v. Brown*, 2 Hill Ch. 558, 563.

7 *Orr*, 8 Bush, 156, 159.

8 *Pomeroy v. Bailey*, 43 N. H. 118, 121.

9 See *Cutter v. Reynolds*, 8 Mon. B. 596; *Malgley v. Hauer*, 7 Johns. 341.

10 *Killough v. Steele*, 1 Stewt. & P. 262.

## ARTICLE IV.—FRAUD IN POSTNUPTIAL SETTLEMENTS.

§ 109. Fraud in law and in fact.

§ 110. Fraud between the parties.

§ 111. Fraud against creditors.

§ 112. Evidence of fraud.

§ 109. Fraud in law and in fact.—A postnuptial settlement may be fraudulent in law or fraudulent in fact.<sup>1</sup> Though a husband when he deals with his wife stands in much the same position as a trustee when he deals with his *cestui que trust*,<sup>2</sup> and the law raises certain presumptions of fraud against him,<sup>3</sup> the distinction between fraudulent in law and fraudulent in fact is generally applied only to conveyances which affect the rights of the grantor's creditors.<sup>4</sup> A settlement made with the actual intention of hindering, delaying, or defrauding creditors is fraudulent in fact; one which naturally does, so is fraudulent in law, for the law conclusively presumes that one intends the natural consequences of his acts.<sup>5</sup> Any conveyance may be fraudulent in fact, but only a voluntary<sup>6</sup> conveyance can be fraudulent in law.<sup>7</sup> For, howsoever much a man is indebted he may in good faith sell or exchange his property, or with it pay one or more of his debts;<sup>9</sup> but he must be just before he is generous,<sup>10</sup> and he cannot give his property away if this makes his debts more difficult to collect;<sup>11</sup> this necessarily prejudices his creditor's rights, and the law presumes fraud.<sup>12</sup> If a settlement be voluntary the grantee's honesty will not give her any rights;<sup>13</sup> but if it be on valuable consideration she will be protected to the extent thereof unless she be a party to an actual fraud.<sup>14</sup>

1 Bump Fraud. Convey. 22.

2 Darlington, 86 Pa. St. 512, 519; 27 Am. Rep. 726.

3 Post, § 110.

- 4 *Post*, § 111.
- 5 *Bump Fraud Convey.* 22, 23,
- 6 *Ante*, §§ 105, 106.
- 7 *Elliott v. Horn*, 10 Ala. 348, 352; *Wood v. Savage*, Walk. Ch. 471, 475; *Wiley v. Gray*, 36 Miss. 510, 515.
- 8 *Wright v. Stanard*, 2 Brock. 311, 315; *ante*, § 105, notes 10-23, § 106.
- 9 *Casson v. Murray*, 15 Mo. 378, 381; *post*, § 116, n. 6.
- 10 *Clayton v. Brown*, 17 Ga. 217, 220; *Black v. Sanders*, 1 Jones, 67.
- 11 *Sexton v. Wheaton*, 8 Wheat. 229; 1 Am. Lead. Cas. 17; *post*, § 116.
- 12 See *Beers v. Botsford*, 13 Conn. 146, 154; *Gardiner v. Wheaton*, 8 Me. 373, 381; *Jones v. Spear*, 21 Vt. 426, 431; *post*, § 116.
- 13 *Matson v. Melchor*, 42 Mich. 477, 480.
- 14 *Prewit v. Wilson*, 103 U. S. 22, 23, 24; *post*, § 111

§ 110. Fraud between the parties in postnuptial settlements.—Formerly, a married woman was deemed entirely under her husband's control, and incapable of voluntary acts in his presence,<sup>1</sup> and even now her torts<sup>2</sup> and crimes<sup>3</sup> committed in his presence are presumed committed under his coercion. So in the case of contracts. These at common law were void,<sup>4</sup> and good in equity only if proved to have been fairly and freely made.<sup>5</sup> But now, although the greatest good faith is required in dealings between husband and wife,<sup>6</sup> which are treated much as dealings between trustee and *cestui que trust* are,<sup>7</sup> and in case of a gift by her to him,<sup>8</sup> or an inadequate consideration,<sup>9</sup> or an advantage secured by him,<sup>10</sup> the burden of proof is on him to show that the transaction was freely and deliberately concluded,<sup>11</sup> the mere fact that he is her husband does not render it a fraud for him to take property from her;<sup>12</sup> but she must prove fraud or undue influence,<sup>13</sup> and allowance will be made for their intimate relation.<sup>14</sup> The husband's fraud or duress will not affect the validity of a wife's transfer in the hands of a *bona fide* purchaser for value;<sup>15</sup> she cannot have her deed to a third party set aside on account of her hus-

band's conduct,<sup>16</sup> unless they were confederates,<sup>17</sup> or the husband acted as such third party's agent in obtaining the deed.<sup>18</sup> In spite of fraud, equity will sustain a settlement between husband and wife if for the benefit of them both.<sup>19</sup> Generally, courts of equity alone will afford them relief.<sup>20</sup>

1 *Ante*, § 38; *post*, § 121.

2 *Ante*, § 66; *post*, ch. xxiv.

3 *Ante*, § 68; *post*, ch. xxv.

4 *Ante*, § 41; *post*, § 359.

5 *Ante*, § 42.

6 Willetts, 104 Ill. 122; Campbell, 80 Pa. St. 298, 309.

7 Darlington, 86 Pa. St. 512, 519; 27 Am. Rep. 726.

8 *Boyd v. De la Montagnie*, 73 N. Y. 498, 502; 29 Am. Rep. 197; *McRae v. Battle*, 69 N. C. 98, 107; Darlington, 86 Pa. St. 512, 520; 27 Am. Rep. 726.

9 Birdsong, 2 Head, 289, 296; *ante*, § 106.

10 *Jenne v. Marble*, 37 Mich. 319, 322.

11 See cases in notes 8-10; *Smyley v. Reese*, 53 Ala. 89, 101; Campbell, 80 Pa. St. 298, 309.

12 *Scarborough v. Watkins*, 9 Mon. B. 540, 547, 548; 50 Am. Dec. 528; *Meriam v. Harlem*, 4 Edw. Ch. 70, 82.

13 *Witbeck*, 25 Mich. 439, 442; *Freeman v. Wilson*, 51 Miss. 329, 333.

14 Consult *Smyley v. Reese*, 53 Ala. 89, 101; *Stone v. Wood*, 85 Ill. 603, 609; *Linn v. Blizzard*, 70 Ind. 23; *Senger v. Rawson*, 50 Iowa, 634; *Scarborough v. Watkins*, 9 Mon. B. 540, 547; 50 Am. Dec. 528; *Battle v. Kasa*, 30 La. An. 940; *Whitridge v. Barry*, 42 Md. 140, 153; *Eccleston v. First*, 48 Md. 145, 160; *Smith v. Osborn*, 33 Mich. 410; *Whitbeck*, 25 Mich. 439, 442; *Jenne v. Marble*, 37 Mich. 319, 322; *Freeman v. Wilson*, 51 Miss. 329, 333; *Ferdon v. Miller*, 34 N. J. Eq. 10, 13 n; *Remington v. Wright*, 43 N. J. I. 451, 452; *Boyd v. De la Montagnie*, 73 N. Y. 489, 502; 29 Am. Rep. 197; *Rexford*, 7 Lans. 6, 7; *Meriam v. Harlem*, 4 Edw. Ch. 70, 82; *McRae v. Battle*, 69 N. C. 98, 107; *Levi v. Earl*, 3 Ohio St. 147; *Campbell*, 80 Pa. St. 298, 309; *Darlington*, 86 Pa. St. 512, 519; 27 Am. Rep. 726; *Hammit v. Bull*, 8 Phila. 29, 30; *Birdsong*, 2 Head, 289, 296.

15 *Connecticut v. McCormick*, 45 Cal. 580; *Spurgin v. Traub*, 65 Ill. 170, 175; *Finnegan*, 3 Tenn. Ch. 510; cases *infra*, n. 16; *ante*, § 100.

16 *Rogers v. Adams*, 66 Ala. 600, 602; *Collins v. Wassell*, 34 Ark. 17, 33; *Connecticut v. McCormick*, 45 Cal. 580; *Spurgin v. Traub*, 65 Ill. 170, 175; *Green v. Scranage*, 19 Iowa, 461, 465; *Baldwin v. Snowden*, 11 Ohio St. 203, 211; *Hammit v. Bull*, 8 Phila. 29, 30.

17 *Fargo v. Goodspeed*, 87 Ill. 290, 296.

18 *Haskitt v. Elliott*, 58 Ind. 493, 499; *Central v. Copeland*, 18 Md. 305, 320; *Comegys v. Clarke*, 44 Md. 108, 110.

19 Birdsong, 2 Head, 289, 296.

20 *Stone v. Wood*, 85 Ill. 603, 609; *ante*, § 53; *post*, §§ 122-124.

§ 111 Fraud against creditors in postnuptial settlements

—A settlement *fraudulent in fact*<sup>1</sup> is void as to all creditors it was intended to hinder, delay, or defraud,<sup>2</sup> whether the settlement is voluntary or not,<sup>3</sup> and whether the creditors are existing<sup>4</sup> or subsequent;<sup>5</sup> *except* that if it be made on valuable consideration<sup>6</sup> it is valid unless the grantee has notice of the fraud.<sup>7</sup> A *bona fide* voluntary<sup>8</sup> conveyance is fraudulent in law,<sup>9</sup> as against existing creditors,<sup>10</sup> but valid as against subsequent creditors.<sup>11</sup>

1 *Ante*, § 103.

2 *Ante*, § 100; *post*, §§ 116, 117, 123.

3 Clayton v. Brown, 17 Ga. 217, 221; Pomeroy v. Bailey, 43 N. H. 118, 120; Metropolitan v. Durant, 22 N. J. Eq. 35, 42; Ashmead v. Kean, 13 Pa. 81, 584, 587; Smith v. Culbertson, 9 Rich. 106, 110; Walcott v. Brander, 10 Tex. 419, 424; *ante*, §§ 104-107.

4 *Post*, § 116.

5 *Post*, § 117.

6 *Ante*, §§ 104-108.

7 Prewitt v. Wilson, 103 U. S. 22, 23, 24; Magill v. Thompson, 7 Peters, 348, 393; Sisson v. Rooth, 30 Conn. 15, 17; Zimmerman v. Heinrichs, 43 Iowa, 260, 264; Matson v. Melchor, 42 Mich. 477, 480.

8 *Ante*, §§ 101-108.

9 Elliott v. Horn, 10 Ala. 348, 352; Bank v. Ennis, Wright, 604, 695; *ante*, § 103; *post*, § 116.

10 Kehr v. Smith, 20 Wall. 31, 35; *post*, § 116.

11 Clayton v. Brown, 30 Ga. 490, 495; *post*, § 117.

§ 112. Evidence of fraud.—Fraud is a question of law or of fact.<sup>1</sup> Whether a *bona fide* voluntary conveyance does prejudice the rights of existing creditors, seems to be a question of law;<sup>2</sup> the legal presumption is that it does,<sup>3</sup> and the burden of proof is on the grantee to show that under all the circumstances of the case the provision was reasonable;<sup>4</sup> that, for example, the grantor was not insolvent,<sup>5</sup> and had after the settlement sufficient<sup>6</sup> funds accessible<sup>7</sup> to his creditors to pay all his debts; if the grantee does not satisfy the court to this effect, the conveyance will be held fraudulent.<sup>8</sup> In such cases all the creditor has to prove is

the grantor's indebtedness to him.<sup>9</sup> But when fraud in fact is alleged by him, the creditor must prove it.<sup>10</sup> Fraud is usually proved by circumstantial evidence—direct proof cannot be expected<sup>11</sup>—and even the grantee's knowledge of the fraud may be inferred from circumstances.<sup>12</sup> Some of the circumstances which tend to prove fraud and which are called badges of fraud,<sup>13</sup> are,<sup>14</sup> secrecy,<sup>15</sup> the grantor's embarrassed condition,<sup>16</sup> the conveyance of all his property,<sup>17</sup> inadequacy of consideration,<sup>18</sup> and retention of possession.<sup>19</sup> In such cases fraud is simply a fact to be ascertained like any other fact.<sup>20</sup>

1 *Ante*, § 103.

2 See *Beers v. Bottsford*, 13 Conn. 146, 151; *Sherwood v. Marwick*, 5 Me. 295, 302; *Meyers v. King*, 42 Md. 65, 71; *Farmers v. Brooke*, 40 Md. 249, 259; *Jones v. Spear*, 21 Vt. 426, 431; cases cited *infra*.

3 *Leavitt*, 47 N. H. 329, 333; *Woolston*, 57 Pa. St. 452, 456.

4 *Hapgood v. Fisher*, 34 Me. 407, 409; 56 Am. Dec. 663; *Warner v. Dove*, 33 Md. 579, 586, 587; *Leavitt*, 47 N. H. 329, 333; *Woolston*, 51 Pa. St. 452, 456.

5 *Bank v. Patton*, 1 Rob. (Va.) 500, 527; *Wilson v. Buchanan*, 7 Gratt. 334, 340.

6 *Hapgood v. Fisher*, 34 Me. 407, 409; 56 Am. Dec. 663; *Smith v. Reavis*, 7 Fred. 341, 343; *Izard*, 1 Bail. Ch. 228, 237.

7 *Bullett v. Worthington*, 3 Md. Ch. 99, 103; *Annin*, 24 N. J. Eq. 185, 191, 194.

8 *Warner v. Dove*, 33 Md. 579, 586, 587; cases *supra*.

9 *Clarke v. McGelhan*, 25 N. J. Eq. 423, 424; *Reynolds v. Lansford*, 16 Tex. 286, 291; *Bank v. Patton*, 1 Rob. (Va.) 500, 527; *Wilson v. Buchanan*, 7 Gratt. 334, 340; *post*, § 115.

10 *Larkin v. McMullin*, 49 Pa. St. 29, 34, 35.

11 *Bump Fraud. Convey.* chaps. 4, 23, pp. 34, 600, 601.

12 *Zimmerman v. Heinrichs*, 43 Iowa, 260, 264.

13 See *Kadogan v. Kennett*, 2 Cowp. 432; *Terrell v. Green*, 11 Ala. 207.

14 *Bump. Fraud. Convey.* ch. 4.

15 *Lyman v. Cessford*, 15 Iowa, 229, 234; *Hatch v. Gray*, 21 Iowa, 29, 32.

16 *Bump Fraud. Convey.* p. 34; *Wilson v. Buchanan*, 7 Gratt. 334, 340.

17 See *Ware v. Gardner*, Law R. 7 Eq. 317, 321; *Alexander*, 1 Low. 470, 474; *Horn v. Ross*, 20 Ga. 210, 223; *Clayton v. Brown*, 30 Ga. 490, 495; *Coates v. Gerlach*, 44 Pa. St. 43, 46; *Peigne v. Snowden*, 1 Desaus. 591, 592; *Cram v. Stickles*, 15 Vt. 252, 257. Compare *Wilder v. Brooks*, 10 Minn. 50, 56; *Casson v. Murray*, 15 Mo. 378, 381.

18 Wright v. Stanard, 2 Brock. 311, 314; Bozman v. Draughan, 3 Stewt. 243, 246; Goff v. Rogers, 71 Ind. 459, 461; Casson v. Murray, 15 Mo. 378, 383.

19 See fully *post*, § 121.

20 Goff v. Rogers, 71 Ind. 459, 461; Hapgood v. Fisher, 34 Me. 407, 409; 56 Am. Dec. 663; Casson v. Murray, 15 Mo. 378, 383; Pomeroy v. Bailey, 43 N. H. 118, 122; Larkin v. McMullin, 44 Pa. St. 29, 35.

## ARTICLE V.—RIGHTS OF CREDITORS.

- § 113. Fraudulent conveyances defined.
- § 114. Statutes protecting creditors.
- § 115. Who are protected as creditors.
- § 116. Rights of existing creditors.
- § 117. Rights of subsequent creditors.
- § 118. Property exempt from creditor's rights.

§ 113. **Fraudulent conveyances defined.**—A transfer by which the grantor hinders, delays or defrauds his creditors is called a “fraudulent conveyance.” Such conveyances are of two kinds,<sup>1</sup> those which are made with the intent to evade creditors, where there is fraud in fact,<sup>2</sup> and those where there is no such intent, but which being voluntary, prejudice creditor's rights, where there is fraud in law.<sup>3</sup> The usual rules as to fraudulent conveyances apply generally to conveyances between husband and wife.<sup>4</sup> But the subject is too vast to be minutely treated herein.

1 See Elliott v. Horn, 10 Ala. 348, 352.

2 Williams v. Avery, 38 Ala. 115, 116; *ante*, § 103.

3 Bank v. Patton, 1 Rob. (Va.) 530, 527; *ante*, § 109.

4 Sexton v. Wheaton, 8 Wheat. 229; 1 Am. Lead. Cas. 17; Shepard, 7 Johns. Ch. 57; Ewell's Lead. Cas. 280.

§ 114. **Statutes protecting creditors against postnuptial settlements.**—The statutes relating to this subject which are constantly referred to,<sup>1</sup> which are merely declaratory of the common law,<sup>2</sup> which, as a part of the common law, are in force in many States,<sup>3</sup> and which form the basis of most modern statutes against fraudulent



conveyances,<sup>4</sup> are: 13 Eliz. ch. 5, and 27 Eliz. ch. 4. Statute 13 Eliz. ch. 5, provides that all transfers made to the end, purpose, and intent to delay, hinder, or defraud creditors and others of their lawful rights are "utterly void" as against such creditors and others; but does not affect *bona fide* transfers for value.<sup>5</sup> Statute 27 Eliz. ch. 4, provides that all transfers made for the intent and purpose of defrauding subsequent purchasers are "utterly void" as against such subsequent purchasers; but does not affect *bona fide* transfers for value.<sup>6</sup> These statutes are construed liberally,<sup>7</sup> and alike at law and in equity;<sup>8</sup> but while at common law fraudulent intent was a mere question of fact,<sup>9</sup> under these statutes it became in part a question of law.<sup>10</sup> The general statutes on the subject in the several States are given the same effect as these statutes in spite of somewhat different wording;<sup>11</sup> but the modern system of public records has greatly diminished the importance of statute 27 Eliz. ch. 4.<sup>12</sup> There are, moreover, such statutes as that in Maryland, which provides that no acquisition of property of wife from husband shall be valid if made in prejudice of the rights of his creditors,<sup>13</sup> and these seem to add nothing to the common law.<sup>14</sup> Bankruptcy acts may also affect such conveyances,<sup>15</sup> for a conveyance by a husband to his wife of all his property is an act of bankruptcy;<sup>16</sup> and other collateral statutes may protect creditors.<sup>17</sup>

1 See citations under "Fraudulent Conveyances" in United States Digest; Bump on Fraud. Convey.; *Sexton v. Wheaton*, 8 Wheat. 229; 1 Am. Lead. Cas. 17.

3 *Cadogan v. Kennet*, Cowp. 434; *Hamilton v. Russell*, 1 Cranch, 309, 316; *Adams v. Broughton*, 13 Ala. 731, 739; *Whittlesy v. McMahon*, 10 Conn. 138, 141; 26 Am. Dec. 382; *Fleming v. Townsend*, 6 Ga. 103, 108; 50 Am. Dec. 318; *Sparrow v. Chesley*, 19 Me. 79; *Hudnal v. Wilder*, 4 McCord, 295, 297; 17 Am. Dec. 744; *Wilt v. Franklin*, 1 Binn. 502, 514, 523; 2 Am. Dec. 474; *Footman v. Pendergrass*, 3 Rich. Eq. 33; *Howard v. Williams*, 1 Bail. 575, 580; 21 Am. Dec. 483.

3 *Gardner v. Cole*, 21 Iowa, 205; *Bohn v. Headley*, 7 Har. & J. 257, 271; *ante*, § 6.

H. & W. — 15.

4 See *Anderson v. Hooks*, 9 Ala. 704; *Blackman v. Wheaton*, 13 Minn. 326.

5 Alex. Brit. Stat. 378-405.

6 Alex. Brit. Stat. 413-420.

7 1 Bish. M. W. § 739.

8 *Hopkirk v. Randolph*, 2 Brock. 133, 139; *ante*, § 16.

9 *Avery v. Street*, 6 Watts, 247, 248; *ante*, §§ 109, 112.

10 See *Beers v. Botsford*, 13 Conn. 146, 154; *Gardiner v. Wheaton*, 8 Me. 373, 381; *Meyers v. King*, 42 Md. 65, 71; *Jones v. Spear*, 21 Vt. 426, 431; *ante*, § 104. The accepted rule now is that the presumptions of law are rebuttable. *Cathcart v. Robinson*, 5 Peters, 264, 280; *Kehr v. Smith*, 20 Wall. 31, 35; *post*, § 116; *ante*, § 112.

11 *Butterfield v. Stanton*, 41 Miss. 15, 30; *Johnston v. Gill*, 27 Gratt. 587, 592.

12 *Sexton v. Wheaton*, 8 Wheat. 229; 1 Am. Lead. Cas. 17, 48.

13 Md. R. C. art. 51, § 19, p. 481.

14 See *Scheffer v. Seitz*, Md. L. Rec. March 22, 1884; *Erdman v. Rosenthal*, 60 Md. 312, 316; *Crane v. Barkdoll*, 59 Md. 534, 545; *Hinkle v. Wilson*, 53 Md. 287, 292; *Trader v. Lowe*, 45 Md. 1, 14; *Keller*, 45 Md. 270, 275; *Plummer v. Jarman*, 44 Md. 634, 637; *Myers v. King*, 42 Md. 65; *Drury v. Briscoe*, 42 Md. 154; *Sanborn v. Long*, 41 Md. 107; *Farmers v. Brooke*, 40 Md. 247, 257; *Green v. Early*, 39 Md. 223, 229; *Green v. Townsend*, 39 Md. 223; *Warner v. Dove*, 33 Md. 579, 586; *Mayfield v. Kilgour*, 31 Md. 240, 244; *Kuhn v. Stansfield*, 28 Md. 210; *Insurance v. Deale*, 18 Md. 26; *Jones*, 18 Md. 464; *Stockett v. Holliday*, 9 Md. 480; *Worthington v. Bullitt*, 6 Md. 192, 198.

15 *Peachy Mar. Settlement*. 210, *et seq.*

16 *Alexander*, 1 Low. 470, 474.

17 *Reich*, 26 Minn. 97, 98.

§ 115. Who are protected as creditors.—To be fraudulent and invalid, a settlement must defeat or prejudice a just and lawful right of action in contract or tort enforceable at law or in equity;<sup>1</sup> one who has such a right is protected<sup>2</sup> as a creditor;<sup>3</sup> but every settlement is valid, unless there is fraud between the parties,<sup>4</sup> against the grantor,<sup>5</sup> his heirs,<sup>6</sup> personal representatives,<sup>7</sup> and beneficiaries.<sup>8</sup> A child, however, is protected as a creditor if wholly unprovided for,<sup>9</sup> just as the wife would be herself if the conveyance were to a stranger.<sup>10</sup> The time at which the right of action arose, whether before or after the execution of the transfer, is, however, important, for the rights of those whose claims arose before (existing creditors)<sup>11</sup> differ from the rights

of those whose claims arose afterwards (subsequent creditors).<sup>12</sup>

1 See the wording of the British statutes, cited *ante*, § 114; Bump Fraud. Convey. 552, 553.

2 *Ante*, § 119; *post*, REMEDIES, §§ 122-124.

3 *Sexton v. Wheaton*, 8 Wheat. 229; 1 Am. Lead. Cas. 17, 42; *King v. Thorp*, 26 Iowa, 283; Bump Fraud. Convey. pp. 502, *et seq.*

4 *Ante*, § 110.

5 *Gardner v. Grady*, 51 Ind. 183, 192; *Schuman v. Peddicord*, 50 Md. 560, 562; *Plummer v. Jarman*, 41 Md. 632, 639; *ante*, § 100; Bump Fraud. Convey. 444.

6 *Peck v. Brummagin*, 31 Cal. 410, 445; *Leonard v. Wills*, 24 Kan. 231; *Jones v. Obenchain*, 10 Gratt. 259, 267; Bump Fraud. Convey. 445.

7 *Cushwa*, 5 Md. 44, 50; Bump Fraud. Convey. 445.

8 *Rogers v. Fales*, 5 Pa. St. 154, 158; *ante*, § 100.

9 *Crooks*, 34 Ohio St. 610, 615. See *Majors v. Everton*, 89 Ill. 56; 31 Am. Rep. 65; *Horder*, 23 Kan. 391. As to father's duty to support child, see *Stewart M. & D.* §§ 404-407.

10 *Stewart M. & D.* § 381.

11 *Post*, § 116.

12 *Post*, § 116.

§ 116. **Rights of existing creditors.**—If a debtor transfers his property for adequate,<sup>1</sup> valuable consideration,<sup>2</sup> his creditors cannot complain unless his actual intention in making the transfer was to defeat or prejudice their rights,<sup>3</sup> and was shared in by his grantee.<sup>4</sup> Still, in the absence of statute,<sup>5</sup> a mere preference of a *bona fide* creditor is lawful, irrespective of intent,<sup>6</sup> and even though the debtor divests himself of all his property.<sup>7</sup> But where the transfer is voluntary,<sup>8</sup> the law raises in favor of existing creditors a presumption of fraudulent intent,<sup>9</sup> which, in some old cases and even now in some States, is irrespective of the amounts of indebtedness, of the debtor's means, and of the property transferred, conclusive;<sup>10</sup> but which, by the great weight of authority, may be rebutted by showing the purity of the grantor's intent and the reasonableness of the provision.<sup>11</sup> The rule as stated by the Supreme Court of the United States reads: "The ancient rule that a vol-

untary postnuptial settlement can be avoided if there was some indebtedness existing has been relaxed, and the rule generally adopted in this country at the present time (1873) will uphold it if it be reasonable, not disproportionate to the husband's means, and clear of any intent actual or constructive to defraud creditors;”<sup>12</sup> and this rule is generally adopted,<sup>13</sup> even where a statute expressly provides that a transfer from husband to wife “in prejudice of the rights of subsisting creditors” shall be invalid.<sup>14</sup> A husband's love and affection for his wife, and a desire to secure her support, is ample reason for a gift to her;<sup>15</sup> still his actual intention is a mere question of fact;<sup>16</sup> but whether the gift is a reasonable one considering his circumstances seems to be a question of law.<sup>17</sup> It is reasonable if his debts are trifling,<sup>18</sup> or if he retains enough to readily pay them all;<sup>19</sup> but unreasonable if his debts are so great as to embarrass him,<sup>20</sup> or if he is insolvent,<sup>21</sup> or if the gift leaves him insolvent,<sup>22</sup> or if he denudes himself of all his property,<sup>23</sup> or if the property he conveys is easily accessible to creditors, while that which he retains, though ample in amount, is inaccessible to them.<sup>24</sup>

1 *Ante*, § 106.

2 *Ante*, §§ 104-108.

3 *Ashmead v. Kean*, 13 Pa. St. 534, 537, 538; *ante*, §§ 107, 111.

4 *Prewitt v. Wilson*, 103 U. S. 22, 23, 24; *ante*, § 111.

5 Statutes often provide against preferences: See, for example Md. Acts 1882, p. 268, § 23.

6 *Sanford v. Wheeler*, 13 Conn. 165, 168; 33 Am. Dec. 389; *Sisson v. Roath*, 30 Conn. 15, 17; *Sedgwick v. Tucker*, 90 Ind. 271, 277; *Randall v. Lunt*, 51 Me. 246, 252; *Crane v. Barkdoll*, 59 Md. 534, 535; *Mayfield v. Kilgour*, 31 Md. 240, 244; *Jordan v. White*, 38 Mich. 253; *Kaufman v. Whitney*, 50 Miss. 103, 108; *Casson v. Murray*, 15 Mo. 378, 381; *Covanhovan v. Hart*, 21 Pa. St. 495, 500; *Ashmead v. Kean*, 13 Pa. St. 534, 535, 587; *ante*, § 45.

7 *Casson v. Murray*, 15 Mo. 373, 381.

8 *Ante*, §§ 104-108.

9 See *Hapgood v. Fisher*, 34 Me. 407, 409; 56 Am. Dec. 663; *Clarke v. McGeighan*, 25 N. J. Eq. 423, 424; *Leavitt*, 47 N. H. 329, 333; *Woolston*, 51 Pa. St. 452, 456; *Reynolds v. Sansford*, 16 Tex. 286, 291; *Bank v. Patton*, 1 Rob. (Va.) 500, 527; *Wilson v. Buchanan*, 7 Gratt. 334, 340; cases *infra*; *ante*, §§ 103, 112.

10 *Reade v. Livingston*, 3 Johns. Ch. 481, 492, 500; *Annin*, 24 N. J. Eq. 181, 191, 194. See notes to *Sexton v. Wheaton*, 8 Wheat. 229; 1 Am. Lead. Cas. 17; *Castillo v. Thompson*, 9 Ala. 937, 945; *Bogard v. Gardley*, 4 Smedes & M. 302, 310; *Davidson v. Graves*, Riley Ch. 219, 234; *Cordery v. Zealy*, 2 Bail. 206, 208.

11 *Hapgood v. Fisher*, 34 Me. 407, 409; 56 Am. Dec. 663; cases *infra*, notes 12, 13.

12 *Kehr v. Smith*, 20 Wall. 31, 35.

13 *Sexton v. Wheaton*, 8 Wheat. 229; 1 Am. Lead. Cas. 17, cases collected; *Jenkyn v. Vaughan*, 3 Drew. 419, 424; *Turnley v. Hooper*, 2 Jur. N. S. 1031, 1033; *Wakefield v. Gibbon*, 26 L. J. Eq. 505, 508; *Kidney v. Coussmaker*, 12 Ves. 136, 148; *French*, 6 DeGex M. & G. 100; *Clark v. Killian*, 103 U. S. 766, 769; *Jones v. Clifton*, 101 U. S. 225, 228; *Kesner v. Trigg*, 98 U. S. 50; *Seitz v. Mitchell*, 94 U. S. 580, 582; *Jackson*, 91 U. S. 142, 145; *Lloyd v. Fulton*, 91 U. S. 479, 486; *Picquet v. Swan*, 4 Mason, 444, 451; *Pinkston v. McLemore*, 31 Ala. 308, 314; *Dodd v. McGraw*, 3 Eng. 84, 105; *Smith v. Yell*, 3 Eng. 470, 475; *Salmon v. Bennett*, 1 Conn. 525; 1 Am. Lead. Cas. 31; 7 Am. Dec. 237; *Abbe v. Newton*, 19 Conn. 20, 27; *Clayton v. Brown*, 17 Ga. 217, 220; *Patrick*, 77 Ill. 555, 561; *Moritz v. Hoffman*, 35 Ill. 553; *Lyne v. Bank*, 5 Marsh. J. J. 545, 554; *Haskell v. Bakewell*, 10 Mon. B. 206, 209; *Trimble v. Ratcliff*, 9 Mon. B. 511, 514; *Duhme v. Young*, 3 Bush, 343, 349, 351; *Enders v. Williams*, 1 Met. (Ky.) 346, 351; *Hapgood v. Fisher*, 34 Me. 407, 409; 56 Am. Dec. 663; *Warner v. Dove*, 33 Md. 579, 586, 587; *Miller v. Johnson*, 27 Md. 6; *Kipp v. Hanna*, 2 Bland, 26, 33; *Gassett v. Grout*, 4 Met. 486, 488; *Herchfeldt v. George*, 6 Mich. 456, 466; *Woodson v. Pool*, 19 Mo. 340, 344; *Pomeroy v. Bailey*, 43 N. H. 118, 120-122; *Smith v. Lowell*, 6 N. H. 67, 69; *Babcock v. Eckler*, 24 N. Y. 623, 628; *Wicher v. Clarke*, 8 Paige, 161, 165; *Warlick v. White*, 86 N. C. 139; 41 Am. Rep. 453; *Smith v. Reavis*, 7 Ired. 341, 343; *Brice v. Myers*, 5 Ohio, 121, 125; *Miller v. Wilson*, 18 Ohio, 108, 114; *Nippes*, 75 Pa. St. 472, 475; *Woolston*, 51 Pa. St. 451, 456; *Tripner v. Abrahams*, 47 Pa. St. 220; *Posten*, 4 Whart. 27, 42; *Miller v. Pearce*, 6 Watts, & S. 97, 401; *Banks v. Brown*, 2 Hill Ch. 553, 566; 30 Am. Dec. 380; *Izard*, 1 Bail. Ch. 228, 237; *Burkey v. Self*, 4 Sneed, 121, 124; *Wilson v. Buchanan*, 7 Gratt. 334, 340; *Huston v. Cantrill*, 11 Leigh, 137, 159; *Com. v. Stickles*, 15 Vt. 252, 257; *Rose v. Brown*, 11 W. Va. 122, 135.

14 *Warner v. Dove*, 33 Md. 579, 586, 587; cases *ante*, § 114, n. 13.

15 *Enders v. Williams*, 1 Met. (Ky.) 346, 351; *ante*, § 105. Compare *ante*, § 87.

16 *Hapgood v. Fisher*, 34 Me. 407, 409; 56 Am. Dec. 663; *Casson v. Murray*, 15 Mo. 278, 383; *Pomeroy v. Bailey*, 43 N. H. 118, 122; *ante*, § 109.

17 *Warner v. Dove*, 33 Md. 579, 586, 587; *ante*, §§ 109, 114.

18 *Smith v. Reavis*, 7 Ired. 341, 343.

19 *Hapgood v. Fisher*, 34 Me. 407, 409; 56 Am. Dec. 663; *Smith v. Reavis*, 7 Ired. 341, 343; *Secor v. Souder*, 95 Ind. 95, 100.

20 *Wilson v. Buchanan*, 7 Gratt. 334, 340.

21 *Bank v. Patton*, 1 Rob. (Va.) 500, 527.

22 *Izard*, 1 Bail. Ch. 228, 237.

23 *Coates v. Gerlach*, 44 Pa. St. 43, 45; see *Alexander*, 1 Low. 470, 474; *Ware v. Gardner*, Law R. 7 Eq. 317, 321; *Horn v. Ross*, 20 Ga. 210, 223; *Clayton v. Brown*, 30 Ga. 490, 495; *Wilder v. Brooks*, 10 Minn. 50, 56; *Peigne v. Snowden*, 1 Desaus. Eq. 592; *Com. v. Stickles*, 15 Vt. 252, 257.

24 *Bullett v. Worthington*, 3 Md. Ch. 99; *Annin*, 24 N. J. Eq. 185, 194.

§ 117. Rights of subsequent creditors.—A settlement is valid as against those who become creditors after it is made,<sup>1</sup> unless there is an actual intent to defraud them;<sup>2</sup> and if the settlement is on valuable consideration,<sup>3</sup> unless the intent is shared in by the grantee.<sup>4</sup> Transferring property with the intention of thus withdrawing it from the operation of debts about to be assumed is fraud in fact,<sup>5</sup> and the transfer of all one's property is strong evidence of such fraud.<sup>6</sup> A subsequent creditor cannot attack a settlement on the ground that it defrauds existing creditors;<sup>7</sup> but if a settlement is set aside by existing creditors, subsequent creditors may come in *pari passu* with them.<sup>8</sup>

1 *Sexton v. Wheaton*, 8 Wheat. 229; 1 Am. Lead. Cas. 17, 25, 40; cases *infra*, n. 2.

2 *Sexton v. Wheaton*, *supra*; *Holmes v. Penney*, 3 Kay & J. 102; *Mattingly v. Nye*, 8 Wall. 370; *Williams v. Avery*, 38 Ala. 115, 118; *Pinkston v. McLemore*, 31 Ala. 308, 311; *Thomas v. Degraffenreid*, 17 Ala. 603, 611; *Elliott v. Home*, 10 Ala. 348, 351; *Clayton v. Brown*, 50 Ga. 490, 495; *Place v. Rhein*, 7 Bush. 585; *Lyne v. Bank*, 5 Marsh. J. J. 545, 554; *Miller*, 23 Me. 22, 24; 39 Am. Dec. 597; *Clark v. French*, 23 Me. 221; 39 Am. Dec. 618; *Niller v. Johnson*, 27 Md. 6, 11; *Kipp v. Hanna*, 2 Bland. 26, 34; *Bennett v. Bedford*, 11 Mass. 421, 423; *Beach v. White*, Walk. Ch. 495; *Teller v. Bishop*, 8 Minn. 226; *Bogard v. Gawley*, 4 Smedes & M. 302, 310; *Vertner v. Humphreys*, 14 Smedes & M. 130; *Pawley*, 42 Mo. 291, 303; *Carson v. Murray*, 15 Mo. 378, 381; *Carlisle v. Rich*, 8 N. H. 44, 50; *Robinson v. Holt*, 39 N. H. 357; *Leavitt*, 47 N. H. 329; *Caswell v. Hill*, 47 N. H. 407; *Carpenter*, 27 N. J. Eq. 502, 503; *Phillips v. Wooster*, 36 N. Y. 412, 414; *Case v. Phelps*, 39 N. Y. 164; *Smith v. Reavis*, 7 Ired. 341, 343; *Webb v. Roff*, 9 Ohio St. 430; *Woolston*, 57 Pa. St. 452, 456; *Greenfield*, 14 Pa. St. 489, 502; *Blake v. Jones*, 1 Bail. Eq. 142, 143; 21 Am. Dec. 530; *Jenkins v. Clement*, 1 Harp. Ch. 72; *Allen v. Walt*, 9 Heisk. 242; *Johnston v. Zane*, 11 Gratt. 552; *Hutchinson v. Kelley*, 1 Rob. (Va.) 125, 134; *Rose v. Brown*, 11 W. Va. 122, 134; *Pike v. Miles*, 23 Wis. 164, 169.

3 *Ante*, §§ 105, 107.

4 *Mogniac v. Thompson*, 7 Peters, 348, 393; *ante*, § 111.

5 *Pawley*, 42 Mo. 291, 303; *ante*, § 109.

6 *Martin v. Oliver*, 9 Humph. 561, 565, 566; 49 Am. Dec. 717; *ante*, § 112.

7 *Lynch v. Raleigh*, 3 Ind. 273, 275; *post*, § 124.

8 See *Elliott v. Horne*, 10 Ala. 348, 352; *Lewis v. Love*, 2 Mon. B. 345, 347; 38 Am. Dec. 161; *Edwards v. Coleman*, 2 Bibb. 204, 205; *Parkman v. Welsh*, 19 Pick. 221, 237; *McConihe v. Sawyer*, 12 N. H. 397, 403; *Hoke v. Henderson*, 3 Dev. 12, 14; 4 Dev. 12, 14; 25 Am. Dec. 677; *Hester v. Wilkinson*, 6 Humph. 215, 218; *post*, § 124.

§ 118. Property exempt from creditor's rights.—Any property of a husband personal,<sup>1</sup> or real,<sup>2</sup> which his creditors could not proceed against,<sup>3</sup> he may as against them settle upon his wife.<sup>4</sup> Thus, there is no fraud in law or in fact,<sup>5</sup> in a conveyance by him to her of the homestead;<sup>6</sup> or of her earnings,<sup>7</sup> or cattle<sup>8</sup> if they are exempt; or of her choses in action,<sup>9</sup> which are not his till reduced to possession,<sup>10</sup> and which his creditors cannot compel him to so reduce.<sup>11</sup>

1 Robb v. Brewer, 70 Iowa, 539, 542.

2 Premo v. Hewitt, 55 Vt. 362, 366.

3 Post, §§ 122-124.

4 Jones v. Brandt, 69 Iowa, 332, 344; Delashmut v. Trau, 44 Iowa, 613, 616; Robb v. Brewer, 70 Iowa, 539, 542; 15 The Reporter, 648, 649; 16 Cent. L. J. 356; Peterson v. Mulford, 36 N. J. L. 481, 489; Woodworth v. Sweet, 51 N. Y. 8, 10; Smethurst v. Thurston, Brightly, 127, 129; Bobenets, 36 Pa. St. 174, 178, 187; Premo v. Hewitt, 55 Vt. 362, 367; Leavitt v. Jones, 54 Vt. 423, 427; 41 Am. Rep. 849; Druitzer v. Bell, 11 Wis. 114, 118; Pike v. Miles, 23 Wis. 164, 168.

5 Ante, § 109.

6 Jones v. Brant, 69 Iowa, 332, 344; Delashmut v. Trau, 44 Iowa, 613, 616; Premo v. Hewitt, 55 Vt. 362, 366; Pike v. Miles, 23 Wis. 164, 164; post, § 314.

7 Robb v. Brewer, 60 Iowa, 539, 542; Premo v. Hewitt, 55 Vt. 362, 366. See Peterson v. Mulford, 36 N. J. L. 481, 489.

8 Leavitt v. Jones, 54 Vt. 423, 427; 41 Am. Rep. 849.

9 Peterson v. Mulford, 36 N. J. L. 481, 489; Woodworth v. Sweet, 51 N. Y. 8, 10; Robinett, 36 Pa. St. 174, 178, 187; Smethurst v. Thurston, Brightly, 127, 129.

10 Post, § 176.

11 Post, § 177.

## ARTICLE VI.—POSSESSION OF HUSBAND AND WIFE.

§ 118 a. Possession of husband and wife generally.

§ 119. Presumptions from.

§ 120. Change of, as delivery.

§ 121. Retention of, as fraud.

§ 118 a. Possession of husband and wife generally.—Three general rules of the law relating to possession, namely (1) possession of chattels is *prima facie* proof of ownership; (2) delivery involves a change of posses-

sion;<sup>2</sup> and (3) retention of possession by a grantor is a badge of fraud, are peculiarly difficult to apply to husband and wife. For, while on the one hand, husband and wife have nominally the same home,<sup>4</sup> and each has the right to live with the other,<sup>5</sup> now as at common law;<sup>6</sup> and both of them therefore not only actually use, enjoy, and possess the property in and about their home,<sup>7</sup> but also incidentally have the right to do so;<sup>8</sup> on the other hand, now that married women's separate property is nearly everywhere recognized, the wife may, as well as the husband, be the actual of the property so used, enjoyed, and possessed, as her equitable<sup>9</sup> or as her statutory<sup>10</sup> separate estate. Whether any presumption arises as to ownership of property so possessed;<sup>11</sup> whether there can be delivery between husband and wife of such property,<sup>12</sup> and whether the continued use and enjoyment of such property by the grantor after such transfer is evidence of fraud,<sup>13</sup> are questions which must be discussed.

1 1 Greenl. Evid. § 34.

2 Benj. Sales, § 675.

3 Bump. Fraud. Convey. ch. 5.

4 *Ante*, §§ 29, 59, 60.

5 Anon. Deane & S. 295, 298, 300; Price, 2 Fost. & F. 263, 264; Barnes v. Allen, 30 Barb. 663, 668; Westlake, 24 Ohio St. 621, 628; 32 Am. Rep. 397; Ximines v. Smith, 39 Tex. 49, 52; Stewart M. & D. § 175; *ante*, §§ 59, 60.

6 Cole v. Van Riper, 44 Ill. 58, 63; Snyder v. People, 26 Mich. 106, 108, 110; 12 Am. Rep. 302; Walker v. Reamy, 36 Pa. St. 410, 414.

7 Larkin v. McMullin, 49 Pa. St. 29, 34, 35.

8 Holcomb v. People's Bank, 92 Pa. St. 338, 343; Walker v. Reamy, 36 Pa. St. 410, 414. See Lee v. Mathews, 10 Ala. 632, 687; Bell, 37 Ala. 536, 542; Cole v. Van Riper, 44 Ill. 58, 63; Schindel, 12 Md. 108, 121, 291, 313; Com. v. Hartwelt, 3 Gray, 450, 452; Snyder v. People, 26 Mich. 106, 109.

9 Discussed, *post*, §§ 197-216.

10 Discussed *post*, §§ 217-243.

11 Hill v. Chambers, 30 Mich. 422, 428; *post*, § 119.

12 Wheeler, 43 Conn. 503, 509; *post*, § 120.

13 Moreland v. Myall, 14 Bush, 474, 477; *post*, § 121.



§ 119. Presumption as to ownership of property in the possession of husband and wife.—At common law husband and wife were one;<sup>1</sup> the wife's existence was merged in that of her husband;<sup>2</sup> it is even said that she was civilly dead;<sup>3</sup> all her present property rights passed to her husband, her personality absolutely,<sup>4</sup> her realty during coverture at least;<sup>5</sup> she had herself no property in possession,<sup>6</sup> and so her possession was her husband's possession,<sup>7</sup> and even money in her pocket was deemed in his actual possession.<sup>8</sup> As a result, the possession of husband and wife at common law was the possession of the husband,<sup>9</sup> and as far as it was evidence of title at all, it was evidence of his title.<sup>10</sup> Courts of equity, however, recognized the separate existence of the wife,<sup>11</sup> and at an early date enforced settlements to the sole and separate use of a married woman;<sup>12</sup> thus arose wives' equitable separate estates;<sup>13</sup> and statutes have now nearly everywhere created statutory separate estates.<sup>14</sup> But although wives may now own and possess property themselves, and the main ground for the common law rule, that possession of the wife is possession of the husband, is thus removed, the form or shadow of the rule still remains, and the presumption still exists, that all property in or about the family matrimonial home,<sup>15</sup> is in the possession of the husband and is his;<sup>16</sup> and that any business carried on jointly by the husband and wife is the husband's.<sup>17</sup> But this presumption is rebuttable;<sup>18</sup> the equivocal possession of husband and wife is the possession of that one of them in whom the title is;<sup>19</sup> and just as the possession of the wife is the possession of the husband when the title is his,<sup>20</sup> so his possession is her possession when the title is hers.<sup>21</sup> So neither of them can rely on the mere fact of possession to prove acquisition of title from the other;<sup>22</sup> the wife not being precluded from

asserting title even to property which her husband has had taxed in his own name with her knowledge.<sup>23</sup> For, the intimacy of the marriage relation renders exclusive possession well nigh impossible,<sup>24</sup> and it is not the policy of the law to interfere with the mutual trust and confidence between husband and wife.<sup>25</sup> Still, the presumption of the husband's ownership does exist;<sup>26</sup> it even continues after his death, so that property held by his widow, who was also his administratrix, was presumed to be held by her in her latter capacity.<sup>27</sup> And it goes so far that even when a wife has bought property herself and in her own name, the purchase money paid is presumed to have been her husband's.<sup>28</sup> This indeed makes but little difference as far as her husband is concerned,<sup>29</sup> or a stranger,<sup>30</sup> for as against them a gift from him to her is good and may be inferred from circumstances;<sup>31</sup> but as against her husband's creditors (as when she sues for taking her goods for his debts)<sup>32</sup> she must prove not only that the purchase was made for herself,<sup>33</sup> but also that it was made out of her separate funds<sup>34</sup> or upon her separate credit.<sup>35</sup> And this presumption has been recognized in a suit where the wife was defendant, and where the burden of proof was held to be on her creditor, who seized goods alleged to be hers, to show that they were hers, and not her husband's.<sup>36</sup> It has, however, been held that the wife's possession under a mortgage is *prima facie* evidence of her title.<sup>37</sup> As to real estate, it has been held that when the husband and wife live together on the wife's farm the husband is presumed the tenant, and owns the crop unless the wife proves that he farmed it as her agent;<sup>38</sup> but this rule is in conflict with the rules, that the increase of separate property is separate property,<sup>39</sup> and that the wife's separate property in the possession of the husband and wife is in her possession,<sup>40</sup> and will

therefore probably not prevail.<sup>41</sup> In fact it is well settled, that a husband may manage his wife's property without acquiring any rights therein, or in any way rendering it liable for his debts.<sup>42</sup> It seems that there can be no such thing as "adverse possession" between husband and wife while they cohabit.<sup>43</sup> Nor is possession of a husband so far possession of his wife that he can set up her title as against his bailor to property held by him as bailee.<sup>44</sup>

1 *White v. Wager*, 25 N. Y. 328, 329; *ante*, § 38.

2 *Burleigh v. Coffin*, 22 N. H. 118, 124; 53 Am. Dec. 236, *ante*, § 38.

3 *O'Farrell v. Simplot*, 4 Iowa, 381, 389; *ante*, § 38.

4 *Cox v. Scott*, 9 Baxt. 305, 310; *post*, §§ 163-183.

5 *Mutual v. Deale*, 18 Md. 26, 47; *post*, §§ 141-162.

6 *Com. v. Williams*, 7 Gray, 337, 338; *post*, § 167.

7 *Bell*, 37 Ala. 536, 542; *post*, § 167.

8 See *Carleton v. Lovejoy*, 54 Me. 445, 446; *Cox v. Scott*, 9 Baxt. 305, 309; *post*, § 167.

9 *Topley*, 31 Pa. St. 328, 329.

10 *Robinson v. Brems*, 90 Ill. 351, 354.

11 *Milner v. Freeman*, 40 Ark. 62, 68; *ante*, §§ 38, 42.

12 2 Story Eq. Jur. §§ 1368, 1378; *post*, §§ 197, 198.

13 *Hulme v. Tenant*, 1 White & T. Lead. Cas. 481, notes; *post*, §§ 197-216.

14 Discussed *post*, §§ 217-243.

15 *Allen v. Eldridge*, 1 Colo. 287, 290; *Walker v. Reamy*, 36 Pa. St. 410, 416.

16 *Bell*, 37 Ala. 536, 541; *Allen v. Eldridge*, 1 Colo. 287, 290; *Huff v. Wright*, 39 Ga. 41, 43; *Robinson v. Brems*, 90 Ill. 351, 354; *Kahn v. Wood*, 82 Ill. 219; *Reeves v. Webster*, 71 Ill. 307; *Farrell v. Patterson*, 43 Ill. 52, 57; *Davison v. Smith*, 20 Iowa, 466; *Com. v. Williams*, 7 Gray, 337, 338; *Hill v. Chambers*, 30 Mich. 422, 428; *Walker v. Reamy*, 36 Pa. St. 410, 416; *Winter v. Walter*, 37 Pa. St. 155, 162; *Rhoads v. Gordon*, 38 Pa. St. 277, 279; *Topley*, 31 Pa. St. 328, 329; *Nelson v. Hollins*, 9 Baxt. 553, 555; *Stanton v. Kirsch*, 6 Wis. 334, 341; *Duress v. Horneffer*, 15 Wis. 195, 197; *Weymouth v. Chicago*, 17 Wis. 550, 551. But see *Whiton v. Snyder*, 88 N. Y. 299.

17 *Brownell v. Nixon*, 37 Ill. 197, 205; *Mason v. Bowles*, 117 Mass. 86, 89; *ante*, § 93.

18 *Hill v. Chambers*, 30 Mich. 422, 428; *Mason v. Bowles*, 117 Mass. 86, 89.

19 See *McNeill v. Arnold*, 17 Ark. 154, 175; *Stewart v. Ball*, 33 Mo. 154, 156; *Scott v. Simes*, 10 Bosw. 314, 320.

20 *Bell*, 37 Ala. 536, 541; *Pope v. Tucker*, 23 Ga. 484, 487; *Davidson v. Smith*, 20 Iowa, 466; *Jordan*, 52 Me. 320, 321; *Carleton v. Lovejoy*, 54 Me. 445, 446; *Com. v. Williams*, 7 Gray, 337, 338; *Walker v. Reamy*, 36 Pa. St. 410, 415; *Duress v. Horneffer*, 15 Wis. 195, 197.

21 *Lee v. Mathews*, 10 Ala. 682, 687; *Robinson*, 44 Ala. 227, 237; *Pinkston v. McLemore*, 31 Ala. 308, 313, 314; *McNeill v. Arnold*, 17 Ark. 154, 175; *Pierce v. Hasbrouck*, 49 Ill. 24, 27; *Hileman*, 85 Ind. 1; *Hanson v. Millett*, 55 Me. 184, 189; *Hill v. Chambers*, 30 Mich. 422, 428; *McNally v. Weld*, 30 Minn. 209; *Scott v. Simes*, 10 Bosw. 314, 320; *Lydia v. Cowan*, 23 N. Y. 505; *Gicker v. Martin*, 50 Pa. St. 138, 140; *Nelson v. Hollins*, 9 Baxt. 553, 555.

22 *Root v. Schaffner*, 39 Iowa, 375, 377; *White v. Zane*, 10 Mich. 333, 335, *Lyle*, 11 Phila. 64, 65; *Bachman v. Killinger*, 55 Pa. St. 414, 417, 418; *Parvin v. Capewell*, 45 Pa. St. 89, 93.

23 *Deck v. Smith*, 12 Neb. 389, 395.

24 *Holcomb v. People's Bank*, 92 Pa. St. 338, 343; *ante*, § 118 a.

25 See *Cole v. Van Riper*, 44 Ill. 58, 63; *Snyder v. People*, 26 Mich. 106, 109; 12 Am. Dec. 302; *Walker v. Reamy*, 36 Pa. St. 410, 414.

26 See also *Alverson v. Jones*, 10 Cal. 9; *Smith v. Hewett*, 13 Iowa, 94; *Eldridge v. Preble*, 34 Me. 148; *Smith v. Henry*, 35 Miss. 361; *Gault v. Sufin*, 41 Pa. St. 307; *Bear*, 33 Pa. St. 525; *Gamber*, 18 Pa. St. 363; *Goodyear v. Rumbaugh*, 13 Pa. St. 480. But see *Johnson v. Runyon*, 21 Ind. 115.

27 *Bradshaw v. Mayfield*, 18 Tex. 21, 27.

28 *Seitz v. Mitchell*, 94 U. S. 580, 582; *Price v. Sanchez*, 8 Fla. 136, 142; *Huff v. Wright*, 39 Ga. 41, 43; *Farrell v. Patterson*, 43 Ill. 52, 59; *Glann v. Younglove*, 27 Barb. 480, 481; *Winter v. Walter*, 37 Pa. St. 155, 161; *Aurand v. Schaffer*, 43 Pa. St. 363, 364; *Rhoads v. Gordon*, 38 Pa. St. 277, 279; *Rose v. Brown*, 11 W. Va. 122, 136. *Contra*, *Saunders v. Garrett*, 33 Ala. 454, 456; *Kluender v. Lynch*, 4 Keves, 361, 363; *Stoll v. Fulton*, 38 N. J. L. 430, 437, 438. See *post*, §§ 120, 132.

29 See *Jackson*, 91 U. S. 122, 125; *Andrews v. Oxley*, 38 Iowa, 578, 580; *Bent*, 44 Vt. 555, 559.

30 *Weymouth v. Chicago*, 17 Wis. 550, 551. See *Faddis v. Woollomes*, 10 Kan. 56; *Miller v. Bannister*, 109 Mass. 289; *Peters v. Fowler*, 41 Barb. 467, 468.

31 *Jennings v. Davis*, 31 Conn. 134, 142; *Mann v. Rixford*, 44 Ill. 129, 133; *Skillman*, 13 N. J. Eq. 403, 407; *Bradshaw v. Mayfield*, 18 Tex. 21, 25; *post*, § 127.

32 *Duress v. Horneffer*, 15 Wis. 195, 197.

33 See *Marshall v. Curtwell*, Law R. 20 Eq. 328, 331; *Grain v. Shipman*, 45 Conn. 572, 583; *Wormley*, 98 Ill. 544; *Dunn v. Hornbeck*, 7 Hun, 629 630; *Bent*, 44 Vt. 555, 559.

34 *Erdman v. Rosenthal*, 60 Md. 312, 316; *Glann v. Younglove*, 27 Barb. 480, 483; *Curry v. Bott*, 53 Pa. St. 400, 403. See also *Blumer v. Pollok*, 18 Fla. 797; *Farrell v. Patterson*, 43 Ill. 52, 59; *Keeney v. Good*, 21 Pa. St. 319; *Rhoads v. Gordon*, 38 Pa. St. 277, 279; *Stanton v. Kirsch*, 6 Wis. 338, 341; *Duress v. Horneffer*, 15 Wis. 195, 197.

35 *Erdman v. Rosenthal*, 60 Md. 312, 316; *Glann v. Younglove*, 27 Barb. 480, 483.

36 *Crane v. Seymour*, 3 Md. Ch. 483, 486.

37 *Morrison v. Koch*, 32 Wis. 254, 259.

38 *Langford v. Grierson*, 5 Ill. App. 362, 366. But see *Stout v. Perry*, 70 Ind. 501, 504; *Bowen v. Arnsden*, 47 Vt. 563, 573.

39 *Bongard v. Core*, 82 Ill. 19, 21; *post*, §§ 209, 227.

40 *Nelson v. Hollins*, 9 Baxt. 553, 555; *supra*, n. 21.

41 *Stout v. Perry*, 70 Ind. 501, 504; *Russell v. Long*, 52 Iowa, 250, 252; *DeBlane v. Lynch*, 23 Tex. 25, 27.

42 *Miller v. Peck*, 13 W. Va. 75, 79-97; *Cooper v. Ham*, 49 Ind. 393, 400-416; *ante*, § 87.

43 *Bell*, 37 Ala. 526, 542; *Veal v. Robinson*, 70 Ga. 809, 817.

44 *Pulliam v. Burlingame*, 13 Cent. L. J. 314, 315.

§ 120. **Change of possession necessary to constitute delivery between husband and wife.**—In the case of a *sale* of chattels the property may pass without a change of possession, delivery being part of the obligation of the vendor;<sup>1</sup> but a *gift* is of no effect without delivery,<sup>2</sup> because until delivery it is an unexecuted contract, and being without consideration is not enforceable even in equity.<sup>3</sup> By delivery is meant a change of possession intended to accompany a change of property.<sup>4</sup> Gifts between husband and wife are by no means uncommon, and are valid in equity if not at law.<sup>5</sup> But the donor's intention to divest himself or herself of the property, and the carrying out of that intention by delivery, must be clearly proved by the donee, wife,<sup>6</sup> or husband,<sup>7</sup> as the case may be. And since husband and wife are about equally in possession of property in and about their common home,<sup>8</sup> and neither can rely on such equivocal possession to prove title as against the other,<sup>9</sup> actual delivery between husband and wife is most difficult to prove,<sup>10</sup> and the only safe way of perfecting a gift between them is by constructive delivery through a formal instrument, such as a bill of sale.<sup>11</sup> To illustrate: If a husband says to his wife, "this wagon is yours," referring to a wagon he is using, and goes on using it as before, the wife cannot claim it even as against him;<sup>12</sup> but if he says to his wife in buying a horse, "I am buying this horse for you—it is yours," and it is then delivered by the vendor to him and put in his stable, he receives and keeps it merely as her agent—it is hers.<sup>13</sup> The above reasoning does

not, however, apply to mere personal effects or ornaments used by the husband or wife,<sup>14</sup> or to such other property as the one or the other uses or enjoys alone.<sup>15</sup>

1 Benj. Sales, §§ 674, *et seq.*

2 Dilts v. Stevenson, 17 N. J. Eq. 407, 413, 414; Woodruff v. Clark, 42 N. J. L. 198, 202; Bradshaw v. Mayfield, 18 Tex. 21, 23.

3 Breton v. Woolven, Law R. 17 Ch. Div. 412, 421; Colteen v. Missing, 1 Madd. 176, 183; Fowler v. Trebein, 16 Ohio St. 493, 497.

4 See 1 Pars. Cont. 234; 2 Schoul. Pers. Prop. 71; Armitage v. Mace, 48 N. Y. Sup. r. 107; Caldwell v. Wilson, 2 Spear, 75.

5 Eddins v. Buck, 23 Ark. 507, 509; Peck v. Brummaglin, 31 Cal. 440, 446; Underhill v. Morgan, 33 Conn. 105, 107; Manny v. Rixford, 44 Ill. 129, 133; Clawson, 25 Ind. 229, 230; Chew, 38 Iowa, 405, 406; Thomas v. Harkness, 13 Bush, 23, 27; Latimer v. Glenn, 2 Bush, 535, 543; Paschall v. Hall, 5 Jones Eq. 108, 110; Seymour v. Fellows, 77 N. Y. 178, 179; Coates v. Gerlach, 44 Pa. St. 43, 45; Bradshaw v. Mayfield, 18 Tex. 21, 26; Fox v. Jones, 1 W. Va. 205, 217; *post*, § 127.

6 Breton v. Woolven, Law R. 17 Ch. Div. 416, 421; Colteen v. Missing, 1 Madd. 176, 183; Pierce, 7 Biss. 426, 427; Machen, 38 Ala. 364, 368; Wheeler, 43 Conn. 503, 509; Woodson v. Pool, 19 Mo. 340, 345; Skillman, 13 N. J. Eq. 403, 407; Dilts v. Stevenson, 17 N. J. Eq. 407, 413, 414; Woodruff v. Clark, 42 N. J. L. 198, 202; Neufville v. Thomson, 3 Edw. Ch. 92, 94; Paschall v. Hall, 5 Jones Eq. 108, 109, 112; Campbell, 80 Pa. St. 298, 306; Wade v. Cantrell, 1 Head, 346, 347.

7 Pierce, 7 Biss. 426, 427; Patton, 75 Ill. 446, 451.

8 Larkin v. McMullin, 49 Pa. St. 34, 35; Holcomb v. Peoples, 92 Pa. St. 338, 343; *ante*, §§ 118 a, 119.

9 White v. Zane, 10 Mich. 333, 335; Allen v. Miles, 36 Miss. 640, 644; Bachman v. Killinger, 55 Pa. St. 414, 417, 418.

10 Pierce, 7 Biss. 426, 428.

11 Cox, Law R. 1 Ch. Div. 302, 306; Enders v. Williams, 1 Met. (Ky.) 346, 350; Hutchins v. Dixon, 11 Md. 29, 40.

12 Dilts v. Stevenson, 17 N. J. Eq. 407, 413.

13 Wheeler, 43 Conn. 503, 509.

14 Pierce, 7 Biss. 426, 427; Gentry v. McReynolds, 12 Mo. 535; Rogers v. Fales, 5 Pa. St. 154, 158.

15 See Pinkston v. McLemore, 31 Ala. 308, 313, 314.

§ 121. Retention of possession as fraud.—As already shown, a wife must clearly prove her title to any property in or about the family home, or apparently in the husband's possession;<sup>1</sup> and as against her husband's creditors or *bona fide* purchasers for value, she must show that she did not acquire such property directly or indirectly from him;<sup>2</sup> or, if she did acquire it from him, that he received a valuable,<sup>3</sup> and indeed adequate

consideration therefor ;<sup>4</sup> or that it was a reasonable gift, considering his means ;<sup>5</sup> i. e., she must show the absence of constructive fraud or *fraud in law*.<sup>6</sup> But in the case of conveyances by a debtor, the general rule is that if after the conveyance is made, he retains possession of the property conveyed, such conduct is evidence of an actual intent to defraud his creditors (*fraud in fact*) and must be explained ;<sup>7</sup> and the question is, does this rule apply to husband and wife ? It is said that a husband's possession of his wife's property is not in itself evidence of fraud,<sup>8</sup> because he has the right growing out of the right of cohabitation to use and possess her property in their home ;<sup>9</sup> but this is not true if his possession is not consistent with the purpose for which the property was given to, or purchased by, her.<sup>10</sup> And although she may, by allowing him to deal with her property as owner, make him her agent with respect thereto, and be bound by his acts,<sup>11</sup> it is not a fraud, and she is not estopped by her silence *in its presence* when he asserts his title to her chattels,<sup>12</sup> at least where the doctrine of coercion of wife by husband is not exploded.<sup>13</sup> But some authorities hold, that, if a husband, with his wife's consent, retains possession of property which he had settled on her, and is thus enabled to get credit, she cannot assert her title ;<sup>14</sup> certainly she cannot if she allows him to retain possession for the purpose of deceiving his creditors.<sup>15</sup> And so, if he should give her chattels for which she would have no use, but which he would have to continue to use in his business, as if a laborer should give his wife his cart, horse, and tools,<sup>16</sup> certainly some special circumstances would have to be proved to rebut the presumption that he meant to secure himself against his creditors.<sup>17</sup> In some States statutes expressly provide that a schedule of the separate property of married women shall be filed ;<sup>18</sup> and that



transfers between husband and wife shall be recorded;<sup>19</sup> and it seems that general statutes which provide that "no property whereof the grantor *shall remain in possession*, shall pass as against his creditors, unless by bill of sale duly recorded,<sup>20</sup> apply to all transfers between husband and wife, where the grantor apparently remains in possession. So that not only to meet the difficulty of proving delivery,<sup>21</sup> but also to rebut the presumption of fraud,<sup>22</sup> transfers between husband and wife should be by formal instrument duly recorded.

1 Walker v. Reamy, 36 Pa. St. 410, 416; *ante*, ‡ 119.

2 Erdman v. Rosenthal, 60 Md. 312, 316; *ante*, §§ 113-118.

3 Duffy v. Insurance, 8 Watts & S. 413, 434; Salman v. Bennett, 1 Conn. 525; 1 Am. Lead. Cas. 31; 7 Am. Dec. 237; *ante*, §§ 104, 105.

4 Goff v. Rogers, 71 Ind. 459, 461; Hirschfeldt v. George, 6 Mich. 456, 468; Davis, 25 Gratt. 587, 596; *ante*, ‡ 106.

5 Kehr v. Smith, 20 Wall. 31, 35; Hapgood v. Fisher, 34 Me. 407, 409; Warner v. Dove, 33 Md. 579, 586, 587; Woolston, 51 Pa. St. 412, 456; Warlick v. White, 86 N. C. 139; 41 Am. Rep. 453; *ante*, ‡ 104.

6 Hapgood v. Fisher, 34 Me. 497, 409; Belford v. Crane, 16 N. J. Eq. 265, 270; Wheaton v. Sexton, 4 Wheat. 504; 1 Am. Lead. Cas. 1; *ante*, ‡ 109.

7 Stadtlen v. Wood, 24 Tex. 622; Bullis v. Borden, 21 Wis. 136; *ante*, ‡ 109.

8 Barncord v. Kuhn, 36 Pa. St. 383, 391. See Cox, Law R. 1 Ch. Div. 302, 306; Ware v. Gardner, Law R. 7 Ex. 317, 321; Wheaton v. Sexton, 4 Wheat. 503; Jones v. Clifton, 107 U. S. 225, 229, 230; Clayton v. Brown, 17 Ga. 217, 219; Lyman v. Cessford, 15 Iowa, 229, 234; Enders v. Williams, 1 Met. (Ky.) 346, 350; Erdman v. Rosenthal, 60 Md. 312, 316.

9 Lee v. Matthews, 10 Ala. 682, 687; Larkin v. McMullin, 49 Pa. St. 29, 34, 35; *ante*, §§ 118 a, 119.

10 Clayton v. Brown, 17 Ga. 217, 219; Enders v. Williams, 1 Met. (Ky.) 346, 350.

11 Spaulding v. Drew, 55 Vt. 255, 257. See Walker v. Carrington, 74 Ill. 445, 465; Early v. Rolfe, 95 Pa. St. 58, 60; *ante*, ‡ 84.

12 Bank v. Lee, 13 Peters, 107, 118; Drake v. Glover, 30 Ala. 390; Murray v. Fox, 11 Mo. 555, 565; Palmer v. Cross, 1 Smedes & M. 48, 68; Carpenter, 27 N. J. Eq. 502, 504; Early v. Rolfe, 95 Pa. St. 58, 61; Ladd v. Hildebrandt, 27 Wis. 135, 143; 9 Am. Rep. 445; *post*, ‡ 417.

13 Bank v. Lee, 13 Peters, 107, 118; *supra*, n. 12; *ante*, §§ 62, 66, 68.

14 Pierce, 7 Biss. 426, 429; Moreland v. Myall, 14 Bush, 474, 477; Bowen v. Amsden, 47 Vt. 569, 573.

15 Lyman v. Cessford, 15 Iowa, 229, 234.

16 See Dilts v. Stevenson, 17 N. J. Eq. 407, 414.

17 See Clayton v. Brown, 17 Ga. 217, 219.



18 See *Humphries v. Harrison*, 30 Ark. 79; *Selover v. Commercial*, 7 Cal. 266; *Price v. Sanchez*, 8 Fla. 136; *Smith v. Hewett*, 13 Iowa, 94, 96; *Odell v. Lee*, 14 Iowa, 411, 413; *post*, § 232.

19 *Jones*, 19 Iowa, 236, 240; *Teague v. Downs*, 60 N. C. 280, 287; *Lewis v. Caperton*, 8 Gratt. 148, 165; *post*, § 125.

20 Md. R. C. 1878, § 45, p. 390.

21 *Enders v. Williams*, 1 Met. (Ky.) 346, 350; *ante*, § 120.

22 *Cox*, Law R. 1 Ch. Div. 202, 306; *Ware v. Gardner*, Law R. 7 Eq. 317, 321.

## ARTICLE VII.—REMEDIES RESPECTING POSTNUPTIAL SETTLEMENTS.

§ 122. In general.

§ 123. Of parties, etc.

§ 124. Of creditors.

§ 122. Remedies in general.—The remedies depend almost entirely on the special modes of procedure in the different States.<sup>1</sup> The remedies available at the time of the conveyance or any new one may be resorted to.<sup>2</sup> A brief summary of the ordinary remedies of the parties and of creditors is hereinafter given.<sup>3</sup>

1 See fully *Bump Fraud. Conv.* ch. 22.

2 *Blenkinsoff*, 1 DeGex, M. & G. 495, 12 Beav. 563; *ante*, § 21.

3 *Post*, §§ 123, 124.

§ 123. Remedies of parties, etc.—Any settlement between the parties is usually enforced in equity.<sup>1</sup> There the wife may have it specifically performed,<sup>2</sup> or rectified;<sup>3</sup> and where she and her husband have conveyed her property in trust for her sole separate use, she may after his death have it conveyed back to her;<sup>4</sup> so when he has bought property in his name with her money, she may compel him to convey to her.<sup>5</sup> But the grantor cannot revoke a settlement<sup>6</sup> or have it set aside,<sup>7</sup> except for fraud.<sup>8</sup> No one not a party or creditor has any remedies at all.<sup>9</sup>

1 *Jones*, 18 Md. 464, 468; *ante*, §§ 42, 53.

2 *Grain v. Shipman*, 45 Conn. 572, 581.

- 3 Hanley v. Pearson, Law R. 13 Ch. D. 545, 549.
- 4 Tucker, 75 Pa. St. 354, 356.
- 5 Keller, 45 Md. 270, 272; *post*, RESULTING TRUSTS, § 132.
- 6 Garner v. Graves, 54 Ind. 183, 192; *post*, § 127.
- 7 Hildreth v. Eliot, 8 Pick. 293, 296; Cushwa, 5 Md. 44, 50; Bowser, 82 Pa. St. 57, 59; *ante*, § 100.
- 8 Stone v. Wood, 85 Ill. 603, 609; *ante*, § 110.
- 9 See *ante*, 110; Currier v. Ford, 26 Ill. 458; Thompson v. Moore, 36 Me. 17; Cushwa, 5 Md. 44, 50; Lemay v. Bibeau, 2 Minn. 291; Graser v. Stellwagen, 25 N. Y. 365; Byrod, 31 Pa. St. 341; Norton v. Kearney, 10 Wis. 443.

§ 124. Remedies of creditors.—Courts of law and equity have concurrent jurisdiction over fraudulent conveyances;<sup>1</sup> a creditor may treat the settlement as voidable, and apply to equity to have it set aside,<sup>2</sup> or as void and attach personalty,<sup>3</sup> or having bought the realty sue in ejectment.<sup>4</sup> But if the grantor has never held the legal title,<sup>5</sup> as where a husband has made a purchase and taken the deed in his wife's name,<sup>6</sup> the creditor must proceed in equity;<sup>7</sup> so in the case of *bona fide* valuable but inadequate consideration.<sup>8</sup> A subsequent creditor has no remedy in the absence of fraud in fact,<sup>9</sup> but when an existing creditor has had a settlement set aside subsequent creditors may participate in the fund.<sup>10</sup>

1 Mulford v. Peterson, 35 N. J. Eq. 127, 133; Bump Fraud. Convey. 530, 531.

2 Bump Fraud. Convey. 534.

3 Cooke, 43 Md. 522, 523; Green v. Early, 39 Md. 223, 229, 230.

4 O'Hara v. Dilworth, 72 Pa. St. 397, 403, 404.

5 Low v. Marco, 52 Me. 45, 49.

6 *Post*, § 132.

7 Bump Fraud. Convey. 532; *post*, § 132.

8 Wright v. Stanard, 2 Brock. 311, 314; *ante*, § 106.

9 Lynch v. Raleigh, 3 Ind. 273, 275; *ante*, § 117. But see Jenkyn v. Vaughan, 3 Drew. 419, 424; Herschfeldt v. George, 6 Mich. 456, 466.

10 Kipp v. Hanna, 2 Bland. 26, 35; Thompson v. Dougherty, 12 Serg. & R. 448, 455, 456; Hey v. Niswanger, 1 McCord Ch. 518, 522; *ante*, § 117; Bump Fraud. Convey. 324.

## ARTICLE III.—PARTICULAR KINDS OF SETTLEMENTS.

- § 125. Deeds.
- § 126. Equitable jointure.
- § 127. Parol gifts of personalty.
- § 128. Bank deposits.
- § 129. Mingling of property.
- § 130. Services and labor.
- § 131. Improvements on real estate.
- § 132. Resulting trusts.
- § 133. Life Insurance policies.
- § 134. Suretyships.

§ 125. **Deeds of settlement.**—Deeds of settlement between husband and wife, especially in the case of separation,<sup>1</sup> are common, and though it is usual to make them through the intervention of trustees,<sup>2</sup> this is not necessary,<sup>3</sup> but where a trustee is needed the husband is treated as such.<sup>4</sup> Such deeds are always good in equity if equitable.<sup>5</sup> To exclude the husband's marital rights in real estate the deed should contain express words,<sup>6</sup> but every gift of personalty from husband to wife is presumed to be for her sole and separate use.<sup>7</sup> In other respects such deeds are like deeds between strangers; for example, they may be delivered in escrow;<sup>8</sup> they are binding on the parties by estoppel.<sup>9</sup> All the property rights of the parties are often settled by deed.<sup>10</sup>

1 Stewart M. & D. §§ 182-191.

2 Barron. 24 Vt. 375, 398.

3 Jones v. Clifton, 101 U. S. 225, 229. See Stewart M. & D. § 186; ante, §§ 41-43.

4 Crooks, 34 Ohio St. 610, 616; Duffy v. Insurance, 8 Watts & S. 413, 433.

5 Shepard, 7 Johns. Ch. 57; 11 Am. Dec. 396; Ewells Lead. Cas. Cov. 280; Sims v. Rickets, 35 Ind. 181, 192; 9 Am. Dec. 679.

6 Plumb v. Ives, 39 Conn. 120, 123; Hoyt v. Parks, 39 Conn. 357, 360, 361; Bowen v. Lebre, 2 Bush, 112, 115; Hutchinson v. Mitchell, 39 Tex. 487, 492; post, § 201.

7 Helmetag v. Frank, 61 Ala. 67, 68; Deming v. Williams, 26 Conn. 226, 231; Story v. Marshall, 24 Ill. 305, 308.

8 Crooks, 34 Ohio St. 610, 616.

9 Mulford v. Peterson, 36 N. J. L. 127, 136; *post*, § 412.

10 Stewart M. & D. §§ 182-191.

§ 126. **Equitable jointure.**—When in a settlement there is a provision for the wife expressly in lieu of her dower, she will, after her husband's death, be compelled to elect to take either such provision or her dower; she cannot take both.<sup>1</sup>

<sup>1</sup> See *ante*, § 105, n. 10; Stewart M. & D. §§ 43 a, 182; *post*, §§ 266, 267, 273.

§ 127. **Parol gifts of personalty.**—Gifts of personalty between husband and wife are usually good in equity if not at law;<sup>1</sup> but as they are transfers of property without consideration,<sup>2</sup> they are invalid as against creditors, whose rights they prejudice.<sup>3</sup> Gifts *causa mortis* differ from gifts *inter vivos* only in that the former are revoked if the donor does not die as expected,<sup>4</sup> and are therefore not separately discussed.<sup>5</sup> The two essentials of a gift are, (1) the donor's intent to vest the title in the donee;<sup>6</sup> (2) the execution of such intent by actual or constructive delivery.<sup>7</sup> If a gift is good only in equity, it must be fair,<sup>8</sup> reasonable,<sup>9</sup> not extravagant,<sup>10</sup> in fine, equitable.<sup>11</sup> But once executed a gift is irrevocable,<sup>12</sup> except under the civil or Spanish law.<sup>13</sup>

1. *The donor's intention* to vest the title in the donee must be clearly proved,<sup>14</sup> and is a mere question of fact, as in the case of gifts between strangers.<sup>15</sup> But special presumptions arise from the relation of the parties.<sup>16</sup> Thus, if a husband buys property in his wife's name, a gift thereof to her is *prima facie* presumed;<sup>17</sup> so if he takes a promissory note for a debt due him payable to her,<sup>18</sup> or puts stock in her name,<sup>19</sup> or deposits money to her credit;<sup>20</sup> so if a note is taken payable to him and her, though he may dispose of it during his life,<sup>21</sup> and perhaps by will,<sup>22</sup> she takes it as

survivor.<sup>23</sup> Still, these presumptions may always be rebutted and the real intent shown.<sup>24</sup> On the other hand, when a wife consents to her husband's expending her money, a gift of it to him is presumed,<sup>25</sup> unless she shows that their intent was different; for example, that he received it as her agent,<sup>26</sup> or as a loan.<sup>27</sup> So a gift is presumed if by her consent he changes her realty into personalty,<sup>28</sup> where personalty is by law his;<sup>29</sup> but the mere possession and user of her chattels by him is of itself no evidence of a gift from her to him.<sup>30</sup>

2. *Delivery* must be clearly proved.<sup>31</sup> A mere declaration, as "I give you this property," without delivery is merely an inchoate gift,<sup>32</sup> and is treated as a promise to make a gift<sup>33</sup>—a promise which not even courts of equity enforce.<sup>34</sup> The same is true though the declaration be in writing,<sup>35</sup> but not if the writing be under seal,<sup>36</sup> by virtue of the principle of estoppel.<sup>37</sup> Declarations are usually evidence only of intent;<sup>38</sup> delivery must be proved by facts showing actual, constructive, or symbolic change of possession.<sup>39</sup> When, however, a husband purchases property for his wife as a gift, delivery to him is delivery to her,<sup>40</sup> and subsequent possession by him is her possession.<sup>41</sup> So that, when a husband bought a horse for his wife, the gift was upheld, though he kept the horse in his stable.<sup>42</sup> But it might have been otherwise had he first bought it for himself and then given it to her;<sup>43</sup> as when he gave her a wagon but retained possession thereof and used it as before.<sup>44</sup> Except in the case of personal ornaments and apparel,<sup>45</sup> it is very difficult to prove actual delivery between husband and wife who are living together;<sup>46</sup> as, for example, delivery of household furniture,<sup>47</sup> and especially so when the question of fraud against creditors arises.<sup>48</sup> And it may be said that the

only safe delivery is by instrument under seal as between the parties,<sup>49</sup> and by recorded instrument as against creditors.<sup>50</sup> Delivery by order is not perfected until the order is accepted or executed;<sup>51</sup> until such time it may be revoked<sup>52</sup> and is revoked by the donor's death.<sup>53</sup> Delivery is not perfect unless accepted by the donee.<sup>54</sup>

1 See *Mews*, 15 Beav. 529; *Kitchen v. Bedford*, 13 Wall. 413, 418; *Eddins v. Buck*, 23 Ark. 507, 509; *Peck v. Brummagin*, 31 Cal. 440, 446; *Deming v. Williams*, 26 Conn. 226, 230; *Manny v. Rixford*, 44 Ill. 129, 133; *Clawson*, 25 Ind. 229, 239; *Thomas v. Harkness*, 13 Bush, 23, 27, 28; *Hutchins v. Dixon*, 11 Md. 29, 40; *Dilts v. Stevenson*, 17 N. J. Eq. 407, 413; *Seymour v. Fellows*, 77 N. Y. 178, 179; *Paschall v. Hall*, 5 Jones Eq. 108, 110; *Coates v. Gerlach*, 44 Pa. St. 43, 45; *Fox v. Jones*, 1 W. Va. 205, 217; *ante*, § 43. Her equitable title becomes legal after her husband's death: *Underhill v. Morgan*, 33 Conn. 105, 108; *Thomas v. Harkness*, 13 Bush, 23, 28.

2 *Ante*, §§ 104-105.

3 1 Parsons Cont. 236; *ante*, §§ 109, 111, 113-117.

4 *Conser v. Snowden*, 54 Md. 175, 183; 1 Parsons Cont. 236, 237.

5 They are valid: *Marshall v. Jaquith*, 134 Mass. 138. See *Lawson*, 1 P. Wms. 441, 442; *Miller*, 3 P. Wms. 356, 358; *Walter v. Hodge*, 2 Swanst. 92; *Whitney v. Wheeler*, 116 Mass. 490, 492; *Whitaker*, 52 N. Y. 368, 371.

6 *Manny v. Rixford*, 44 Ill. 129, 133; *Skillman*, 13 N. J. Eq. 403, 407; *Paschall v. Hall*, 5 Jones Eq. 108, 110.

7 See generally, *Connor v. Trawick*, 37 Ala. 230; 1 Ala. Sel. Cas. 258; *Camp*, 36 Conn. 83; 4 Am. Rep. 39; *Minor v. Rogers*, 40 Conn. 512; 16 Am. Rep. 60; *Kerrigan v. Routigan*, 43 Conn. 17, 23; *Wheeler*, 43 Conn. 503; *Evans v. Lipscomb*, 31 Ga. 71; *Cranz v. Krager*, 22 Ill. 74; *Taylor v. Henry*, 48 Md. 550; 30 Am. Rep. 486; *Davis v. Ney*, 125 Mass. 590; 28 Am. Rep. 272; *Kimball v. Leland*, 110 Mass. 325; *Crittenden v. Phoenix*, 41 Mich. 442; *Curry v. Powers*, 70 N. Y. 212; 26 Am. Rep. 577; *Tillinghast v. Campbell*, 80 Pa. St. 298, 306; *Wheaton*, 8 R. I. 536; 5 Am. Rep. 621; *infra*, notes 31-54; *ante*, § 120.

8 *Clawson*, 25 Ind. 229, 239; *Hatch v. Gray*, 21 Iowa. 29, 32.

9 *Coates v. Gerlach*, 44 Pa. St. 43, 45.

10 *Paschall v. Hall*, 5 Jones Eq. 108, 110.

11 *Ante*, § 43.

12 *Garner v. Graves*, 54 Ind. 183, 192. See *Rivers v. Carleton*, 50 Ala. 40; *Chew*, 38 Iowa, 405, 406.

13 *Fuller v. Ferguson*, 26 Cal. 546, 574; *Bradshaw v. Mayfield*, 18 Tex. 21, 25; *Ferris v. Parker*, 13 Tex. 385.

14 *Jennings v. Davis*, 31 Conn. 134, 142; *Manny v. Rixford*, 44 Ill. 129, 133; *Skillman*, 13 N. J. Eq. 403, 407; *Neufville v. Thompson*, 3 Eddw. Ch. 92, 94; *Paschall v. Hall*, 5 Jones Eq. 108, 109, 112; *Earl v. Champion*, 65 Pa. St. 191, 194; *Bradshaw v. Mayfield*, 18 Tex. 21, 25.

15 2 Schoul. Pers. Prop. 88; 1 Parsons Cont. 234.

16 *Irvine v. Greever*, 32 Gratt. 411, 417. See *Welch*, 63 Mo. 57, 61; *ante*, §§ 118-121.

- 17 Jackson, 91 U. S. 122, 125; *post*, § 132.
- 18 Phelps, 20 Pick. 556, 559; Rynders v. Crane, 3 Daly, 339, 347; Scott v. Innes, 10 Bosw. 314, 320.
- 19 Mason v. Fuller, 36 Conn. 160, 163; Jennings v. Davis, 31 Conn. 134, 142, 143; Neufville v. Thompson, 3 Edw. Ch. 92, 94.
- 20 Howard v. Windham, 40 Vt. 507, 509; *post*, § 123.
- 21 Towle, 114 Mass. 167, 168.
- 22 Pile, 6 Lea, 503, 511; 40 Am. Rep. 50.
- 23 Sandford, 58 N. Y. 60, 72; 45 N. Y. 723; *post*, §§ 123, 132.
- 24 Snider v. Ridgeway, 49 Ill. 522, 524; cases cited *post*, § 123.
- 25 Tyson, 54 Md. 35, 38; Mellinger v. Bansman, 45 Pa. St. 522, 529; *ante*, § 42.
- 26 *Ante*, § 86.
- 27 *Ante*, § 42.
- 28 See CHANGE OF REALTY INTO PERSONALTY, *post*, § 126.
- 29 Latimer v. Glenn, 2 Bush, 535, 543.
- 30 White v. Zone, 10 Mich. 333, 335; Allen v. Miles, 36 Miss. 640, 644; *ante*, § 119.
- 31 Dilts v. Stevenson, 17 N. J. Eq. 407, 413, 414. See Cotteen v. Missing, 1 Madd. 176, 183; Woodruff v. Clark, 42 N. J. L. 198, 202; *supra*, n. 7; *infra*, notes 32-37; *ante*, § 120.
- 32 Pierce, 7 Biss. 426, 427; Machen, 38 Ala. 364, 368; Woodson v. Pool, 19 Mo. 340, 345; Dilts v. Stevenson, 17 N. J. Eq. 407, 414; Wade v. Cantrell, 1 Head, 346, 347. See Prater v. Frazier, 11 Ark. 249; Henderson, 21 Mo. 379. Husband's naked declarations are no evidence as against third parties of wife's title; Hanson v. Millett, 55 Me. 184, 190; Parvin v. Capewell, 45 Pa. St. 89, 93.
- 33 2 Schoul. Pers. Prop. 71.
- 34 Cotteen v. Missing, 1 Madd. 176, 183; Breton v. Woollven, Law R. 17 Ch. Div. 416, 421; Crooks, 34 Ohio St. 610, 615.
- 35 Breton v. Woollven, Law R. 17 Ch. Div. 416, 421.
- 36 Fox, Law R. 1 Ch. Div. 302, 306; Enders v. Williams, 1 Met. (Ky.) 346, 350; Mulford v. Peterson, 35 N. J. L. 127, 136. See McCutchen, 9 Port. 650.
- 37 2 Schoul. Per. Prop. 84; *post*, § 409.
- 38 See Olds v. Powell, 7 Ala. 653; Burney v. Ball, 24 Ga. 505; Morley v. Bunting, 1 Dev. 3; Sims v. Saunders, Harp. 374; 2 Schoul. Per. Prop. 85.
- 39 See 1 Parson's Cont. 234; 2 Schoul. Per. Prop. 69 *et seq.*; *ante*, § 120.
- 40 Scott v. Simes, 10 Bosw. 314, 320.
- 41 See Wheeler, 43 Conn. 503, 509; Stewart v. Ball, 23 Mo. 154, 156; *ante*, §
- 42 Wheeler, 43 Conn. 503, 509.
- 43 Wheeler, 43 Conn. 503, 509.
- 44 Dilts v. Stevenson, 17 N. J. Eq. 407, 414.
- 45 Pierce, 7 Biss. 426, 427; Rogers v. Fales, 5 Pa. St. 154, 158.
- 46 *Ante*, § 121.
- 47 Pierce, 7 Biss. 426, 428. Compare Allen v. Cowan, 23 N. Y. 502.

48 Bump Fraud. Convey. ch. 5; *ante*, §§ 111, 121.

49 See *Millers v. Andrus*, 1 La. An. 237; *Hutchins v. Dixon*, 11 Md. 29, 41; *Woodson v. McClelland*, 4 Nev. 495; *Brummet v. Barber*, 2 Hill (S. C.) 107; cases *supra*, n. 36. Consult *ante*, §§ 102, 129, 125.

50 See *Hatch v. Gray*, 21 Iowa, 29, 32; *Lyman v. Cessford*, 15 Iowa, 229, 334; *ante*, § 121.

51 See *Chalmers Bills & Notes*, 261, 262; *Bromley v. Brunton*, 37 Law J. Ch. 902; Law R. 6 Eq. 275; *Hughes v. Stubbs*, 11 Jur. N. S. 913; *Howard v. Pace*, 15 Ga. 486. It is a revocable agency.

52 *Taylor v. Henry*, 48 Md. 550, 557, 558; 30 Am. Rep. 486.

53 See *Jones v. Lock*, Law R. 1 Ch. 25; *Beak*, Law R. 13 Eq. 489; *Smith*, 3 Stew. 564; *Taylor v. Henry*, 48 Md. 550, 558; 30 Am. Rep. 486; *Wellborn v. Odd Fellows*, 56 Tex. 501, 505; *post*, § 125.

54 2 Schoul. Per. Prop. 85.

§ 128. **Bank deposits of husband and wife.**—A deposit by a husband of his own money in the names of himself and wife is not in itself a gift to her,<sup>1</sup> and if it is simply payable to her she is a mere agent to draw it,<sup>2</sup> and her agency ceases on his death.<sup>3</sup> If the deposit is made in her name alone, its effect depends on the circumstances of the case; *prima facie*, except where the community system prevails,<sup>5</sup> it is a gift to her,<sup>6</sup> good against his heirs,<sup>7</sup> though not against his creditors;<sup>8</sup> but it may be shown that it was not a gift to her,<sup>9</sup> as where it was intrusted to her for the support of the family.<sup>10</sup> Of course as between her and the bank she may draw it, if the deposit is in her sole name.<sup>11</sup> So if she deposits his money with his consent in her name, the deposit is deemed a gift to her.<sup>12</sup> But a gift by a husband to his wife of a deposit in his name, must be perfected by delivery.<sup>13</sup> A check alone is not delivery,<sup>14</sup> and if he dies before his wife draws the money or has the check accepted, the gift does not take effect.<sup>15</sup>

1 Brown, 23 Barb. 565, 568, 569. See Green, 11 Week. Dig. 374; *post*, § 311.

2 See *ante*, §§ 89-93.

3 *Wellborn v. Odd Fellows*, 56 Tex. 501, 505; *Second v. Wrightson*, 13 Md. Law Rec. 184, Feb. 7, 1885.

4 *Way v. Peck*, 47 Conn. 23, 25; *McClusky v. Provident Inst.* 103 Mass. 300, 306.

5 *Wellborn v. Odd Fellows*, 56 Tex. 501, 504; *post*, §§ 312-319.



- 6 Howard *v.* Windham, 40 Vt. 597, 599.
- 7 Fisk *v.* Cushman, 6 Cush. 20, 25; Howard *v.* Windham, 40 Vt. 597, 599.
- 8 Ames *v.* Chew, 5 Met. 320, 323; Spelman *v.* Aldrich, 126 Mass. 113, 117.
- 9 Way *v.* Peck, 47 Conn. 23, 25; McCubbin *v.* Patterson, 16 Md. 179, 184; McClusky *v.* Provident Inst. 103 Mass. 300, 306.
- 10 McCubbin *v.* Patterson, 16 Md. 179, 184; Bates *v.* Brockport, 89 N. Y. 236.
- 11 Sweeny *v.* Boston, 116 Mass. 384, 386.
- 12 Jennings *v.* Davis, 31 Conn. 134, 142, 143.
- 13 *Ante*, §§ 120, 127.
- 14 Chalmers Dig. Bills, etc. art. 262.
- 15 Couser *v.* Snowden, 54 Md. 175, 183; *ante*, § 127.

§ 129. **Mingling of wife's with husband's property.**—When property of a wife has become mixed with that of her husband questions arise as to the rights therein of the respective parties and their creditors.<sup>1</sup> If an ascertainable sum of a wife's money is mingled by her husband with his own without her consent,<sup>2</sup> or upon an understanding that it shall be returned,<sup>3</sup> she is to the extent of such sum her husband's *cestui que trust* or creditor;<sup>4</sup> but her consent alone to such a course is merely evidence of a waiver of her rights and a gift to him.<sup>5</sup> Thus, if a fund of their mingled means is invested with the consent of both in the name of one, a gift to that one is *prima facie* intended,<sup>6</sup> but the other may show that he or she did not relinquish his or her rights, and establish a resulting trust,<sup>7</sup> or come in as a creditor.<sup>8</sup> So, if he invests a joint fund in her name his creditors can attack the investment only to the extent of his interest.<sup>9</sup> If, however, the amount of money mingled is not ascertainable she cannot recover from him or his estate.<sup>10</sup> If by statute her *separate* earnings are hers, she has thereby no interest in money earned jointly with her husband;<sup>11</sup> she must keep her separate property separate;<sup>12</sup> nor can she claim a gift to her of her earnings if these are mingled with her

husband's;<sup>13</sup> in such case there is no delivery;<sup>14</sup> so that usually a joint business of husband and wife is the husband's business,<sup>15</sup> and she has only the rights of a creditor,<sup>16</sup> and these only to the extent of money actually loaned.<sup>17</sup> But she does not waive her title to chattels by allowing her husband to use them, and mingle them with his own,<sup>18</sup> as in the case of furniture;<sup>19</sup> though of course she may give them to her husband.<sup>20</sup> The mingling by making improvements on land<sup>21</sup> is separately considered. When husband and wife died about the same time, each leaving a separate estate, they were held equally entitled to a fund found in her trunk.<sup>22</sup>

1 See *Hardin v. Darwin*, 66 Ala. 55, 63; *Chambers v. Richardson*, 57 Ala. 85, 90; *Dent v. Slough*, 40 Ala. 518, 523; *Bridges v. Phillips*, 25 Ala. 136, 138; *Langford v. Thurlby*, 70 Iowa, 105, 107; *Hawkins v. Providence*, 119 Mass. 596, 598; 20 Am. Rep. 353; *McClusky v. Provident*, 103 Mass. 300, 306; *Glover v. Alcott*, 11 Mich. 470, 479; *Pawley v. Vogel*, 42 Mo. 291, 302; *Quidort v. Pergeaux*, 18 N. J. Eq. 472, 480; *Freeman v. Orrer*, 5 Duer. 476, 479; *Filch v. Rathbun*, 61 N. Y. 579, 581; *Birkback v. Ackroyd*, 11 Hun, 365, 366; *Glidden v. Taylor*, 16 Ohio St. 509, 521; *post*, § 311.

2 *Gover v. Owings*, 16 Md. 91, 99; *ante*, § 43.

3 *Hill*, 38 Md. 183, 185; *ante*, § 43.

4 *Dent v. Slough*, 40 Ala. 518, 523; *Chambers v. Richardson*, 57 Ala. 85, 90; *ante*, § 43.

5 *Hawkins v. Providence*, 119 Mass. 596, 598; 20 Am. Rep. 353; *ante*, §§ 43, 127.

6 *Hardin v. Darwin*, 66 Ala. 55, 63; *Adlard*, 65 Ill. 212, 216, 217; *Jacobs v. Miller*, 50 Mich. 119, 124. Consult *post*, § 132; *ante*, § 127.

7 *Hardin v. Darwin*, 66 Ala. 55, 63; *post*, § 132.

8 *Chambers v. Richardson*, 57 Ala. 85, 90.

9 *Bridges v. Phillips*, 25 Ala. 136, 138; *ante*, § 106; *post*, § 432. Unless she is estopped: *Post*, § 417.

10 *McClusky v. Provident*, 103 Mass. 300, 306; *Glover v. Alcott*, 11 Mich. 470, 479.

11 *Ante*, § 65; *post*, § 228.

12 *Birkback v. Ackroyd*, 11 Hun, 365, 366.

13 *Quidort v. Pergeaux*, 18 N. J. Eq. 472, 480; *Pawley v. Vogel*, 42 Mo. 291, 302, 303; *ante*, § 65.

14 Delivery essential, *ante*, §§ 120, 127.

15 *Dent v. Slough*, 40 Ala. 518, 523; *Langford v. Thurlby*, 70 Iowa, 105, 107; *Freeman v. Orrer*, 5 Duer. 476, 479, *ante*, §§ 65, 87, 93.

16 *Glidden v. Taylor*, 16 Ohio St. 509, 521.

17 *Dent v. Slough*, 40 Ala. 518, 523; *Chambers v. Richardson*, 57 Ala. 85, 90; *Glover v. Alcott*, 11 Mich. 470, 479.

18 *Filch v. Rathbun*, 61 N. Y. 579, 581.

19 *Filch v. Rathbun*, 61 N. Y. 579, 581.

20 *Shirley*, 9 Paige, 363, 365.

21 *Post*, § 131.

22 *Bergen v. Van Liew*, 36 N. J. Eq. 637, reversing 36 N. J. Eq. 251.

§ 130. **Settlements of personal labor, etc.**—A husband may labor gratuitously for his wife,<sup>1</sup> as in the management of her property,<sup>2</sup> and his creditors do not thereby acquire any rights against her or her property.<sup>2</sup> When a wife's services are in law her husband's,<sup>4</sup> he cannot as against his creditors give her money already earned,<sup>5</sup> such earnings are no consideration for a settlement;<sup>6</sup> but even as against his creditors he may, it seems, abandon all rights in her future earnings.<sup>7</sup> When a wife is entitled to her separate earnings,<sup>8</sup> if she labors jointly with her husband without any special understanding, it is presumed that she intended to give her services to him.<sup>9</sup>

1 See HUSBAND AS WIFE'S AGENT, *ante*, §§ 84-83.

2 *Aldridge v. Muirhead*, 101 U. S. 397, 399.

3 *Cooper v. Ham*, 49 Ind. 393, 416; *Miller v. Peck*, 18 W. Va. 75, 99; *ante*, § 87.

4 *Ante*, § 65.

5 *Cramer v. Reford*, 17 N. J. Eq. 367, 380.

6 *Ante*, § 105, n. 28.

7 *Peterson v. Mulford*, 36 N. J. L. 481, 487, 489; *Quidort v. Fergeaux*, 18 N. J. Eq. 472, 479. Not if actual fraud: *Hazenbaker v. Goodfellow*, 64 Ill. 338, 241. The decisions are inharmonious. A gift void against creditors: *Bashim v. Chamberlain*, 7 Mon. B. 443, 444, 445. Void against existing creditors: *Glaze v. Blake*, 56 Ala. 379, 385; *Pinkston v. McLemore*, 31 Ala. 308, 311. Void against subsequent: *Keith v. Wombell*, 3 Pick. 211, 213. Not void against subsequent unless actual fraud: *Glaze v. Blake*, 56 Ala. 379, 385. Good against devisees: *Jones v. Reid*, 12 W. Va. 350, 364; 29 Am. Rep. 455. Her earnings not liable to be attached for his debts if his earnings are exempt: *Hoyt v. White*, 46 N. H. 45, 47.

8 *Ante*, § 65; *post*, § 228.

9 *McClusky v. Provident*, 103 Mass. 300, 304; *Hollowell v. Horter*, 35 Pa. St. 375, 380; *ante*, §§ 65, 86. Consult *post*, § 177.

§ 131. **Improvements by one spouse of real estate of other.**

—The land of one spouse is not liable for improvements placed upon it by the other either to such other<sup>1</sup> or to such other's creditors,<sup>2</sup> except (1) in the case of a contract by the owner of the land which renders it liable,<sup>3</sup> or (2) as against creditors, in the case of actual fraud.<sup>4</sup> As a general rule improvements placed upon real estate without any agreement of the owner to the contrary, become a part of the realty and are lost to the party who places them there and to his creditors.<sup>5</sup> Besides a married woman's lands can be charged only by her own contract under some statute<sup>6</sup> or in equity,<sup>7</sup> and her husband cannot, except as her agent in fact,<sup>8</sup> charge them for her<sup>9</sup>—he cannot, for example, authorize a mechanic's lien on them.<sup>10</sup> As between the parties in the absence of contract there seems to be no ground even for equitable interference,<sup>11</sup> although when a husband improperly uses his wife's money to improve his lands equity will cause her to be reimbursed when the lands are sold.<sup>12</sup> Nor ought a wife's lands to be liable at all for improvements placed on them against her wishes or without her consent.<sup>13</sup> But when a husband, who, within the knowledge of his wife, is indebted, with her consent improves her property, and becomes unable to pay his debts, there is good ground for equitable interference.<sup>14</sup>

1 Consult *Dick v. Hamilton*, 1 Deady, 322; *Coleman v. Smith*, 52 Ala. 259, 261; *Hoot v. Sorrell*, 11 Ala. 388, 403; *Swain v. Duane*, 48 Cal. 258, 360; *Beam v. Scroggin*, 12 Ill. App. 321, 330; *Mathes v. Dobschuetz*, 72 Ill. 438; *Capp v. Stewart*, 38 Ind. 479, 482; *Crickmore v. Breckenridge*, 51 Ind. 294, 297, 298; *Corning v. Fowler*, 24 Iowa, 584, 586; *Price v. Leydel*, 46 Iowa. 696; *Robinson v. Huffman*, 15 Mon. B. 80, 83; *Wilson v. Jones*, 46 Md. 349, 357; *Wilson v. Sands*, 36 Md. 38; *Lynde v. McGregor*, 13 Allen, 182, 185; *Halley v. Huntington*, 21 Minn. 325, 327; *Kirby v. Bruns*, 45 Mo. 234, 235; *Bank v. Bartlett*, 8 Neb. 319; *Caswell v. Hill*, 47 N. H. 407, 415; *Oinsley v. Mead*, 3 Lans. 116, 124; *Barto*, 55 Pa. St. 386, 392; *Cater v. Eveleigh*, 4 Des. 19, 20; 6 Am. Dec. 596; *Wilkinson*, 1 Head, 305, 310; *Knott v. Carpenter*, 3 Head, 542, 544; *Hughes v. Peters*, 1 Cold. 67, 70; *Holder v. Crump*, 10 Lea, 320; *Premo v. Hewitt*, 55 Vt. 362, 367; *White v. Hildreth*, 32 Vt. 265, 267; *Webster v. Hildreth*, 33 Vt. 457, 458; *Rose v. Brown*, 11 W. Va. 122, 127; *Bump Fraud. Conv.* 242; *ante*, §§ 87.

2 *Capp v. Stewart*, 38 Ind. 479, 482; *Corning v. Fowler*, 24 Iowa, 584, 586; *Robinson v. Huffman*, 15 Mon. B. 80, 83; *Premo v. Hewitt*, 55 Vt. 362, 367; cases *supra*, n. 1.

3 *Crickmore v. Breckenridge*, 51 Ind. 294, 298; *Wilson v. Jones*, 46 Md. 349, 357. But see under Community System, *Roth*, 33 La. An. 540; *post*, § 314.

4 *Corning v. Fowler*, 24 Iowa, 584, 586. See *Hott v. Sorrell*, 11 Ala. 388, 406; *Kirby v. Bruns*, 45 Mo. 234, 235; *Caswell v. Hill*, 47 N. H. 407, 415; *Barto*, 55 Pa. St. 386, 392; *Cater v. Eveleigh*, 4 Desaus. Eq. 19, 20; 6 Am. Dec. 596; cases *supra*, n. 1.

5 See *Mather v. Fraser*, 2 Kay & J. 536; *Farrar v. Stackpole*, 6 Me. 154; 19 Am. Dec. 201; *Green v. Phillips*, 26 Gratt. 572; 21 Am. Rep. 323; *Boone Real Prop.* § 9.

6 *Hall v. Eccleston*, 37 Md. 510, 519, 520; *post*, § 238.

7 *Perkins v. Elliott*, 23 N. J. Eq. 526, 528, 533; *post*, §§ 296, 297.

8 *Halley v. Huntington*, 21 Minn. 325, 327; *ante*, §§ 84, 83.

9 *Capp v. Stewart*, 38 Ind. 479, 482; *Ainsley v. Mead*, 3 Lans. 116, 124; *Knott v. Carpenter*, 3 Head, 542, 544; *Hughes v. Peters*, 1 Cold. 67, 70; *ante*, §§ 84-88.

10 *Knott v. Carpenter*, 3 Head, 542, 544.

11 As gifts are not discountenanced, *ante*, §§ 100, 105, 127.

12 *Coleman v. Smith*, 52 Ala. 259, 261. Doctrine of resulting trust, *post*, § 132.

13 *Barto*, 55 Pa. St. 386, 392.

14 *Rose v. Brown*, 11 W. Va. 122, 137; *supra*, notes 1, 4.

## § 132. Resulting trusts between husband and wife.—

1. When a husband buys *with his wife's money in his own name*, there arises a resulting trust in her favor,<sup>1</sup> unless a different intention on her part is shown;<sup>2</sup> and the burden of proof is on the husband to show she intended a gift to him,<sup>3</sup> which is, however, *prima facie* established by proof of her knowledge and consent.<sup>4</sup> The wife, on her part, must clearly show that her money was paid.<sup>5</sup> When such a resulting trust has arisen, the husband's creditors cannot complain if he conveys the legal title to her,<sup>6</sup> though he does so to defeat their remedies against the property.<sup>7</sup> While this property is not liable for the husband's debts,<sup>8</sup> his *bona fide* assignee for value without notice takes it clear of the trust.<sup>9</sup>

2. When a husband buys *with his own money in his wife's name*, the transaction is deemed an advancement

and gift to her,<sup>10</sup> unless a different intention on his part is shown,<sup>11</sup> as where she had agreed to hold it for him,<sup>12</sup> or was invested with the title for his convenience, he being ill,<sup>13</sup> or a foreigner.<sup>14</sup> In such cases no resulting trust arises in favor of himself,<sup>15</sup> or his heirs,<sup>16</sup> but one does arise in favor of such creditors of his as could have set aside a direct conveyance of equal value from him to her,<sup>17</sup> that is to say, existing creditors,<sup>18</sup> unless the settlement was fair and reasonable,<sup>19</sup> but not subsequent creditors,<sup>20</sup> unless there was fraud in fact.<sup>21</sup> For a married woman may be trustee, even by implication and against her will.<sup>22</sup> Still in these cases she is trustee only to the extent of the money paid by her husband.<sup>23</sup>

3. Every purchase by a married woman *in her own name* is deemed to have been made with her *husband's money*,<sup>24</sup> but she may show her funds were used.<sup>25</sup> So if she has paid only a part she is directly interested in the purchase to that extent,<sup>26</sup> and holds the title as security<sup>27</sup> when it is assailed by her husband's creditors.<sup>28</sup>

4. A purchase by a married woman *with her husband's funds in her own name* is deemed a settlement by him on her,<sup>29</sup> unless it appears that she did so wrongfully,<sup>30</sup> or with a different purpose.<sup>31</sup>

5. A purchase with the *money of both in the name of one* is deemed a gift to that one,<sup>32</sup> unless the other shows a different intent,<sup>33</sup> or a breach of trust.<sup>34</sup> If the purchase is in the *name of both*, a tenancy by entireties is created.<sup>35</sup>

6. A resulting trust can be enforced only in equity.<sup>36</sup>

1 Harris v. Brown, 30 Ala. 401, 402; Plummer v. Jarman, 41 Md. 632, 638; Keller, 45 Md. 270, 275; Wales v. Newbould, 9 Mich. 45, 64; Barnard v. Kuhn, 36 Pa. St. 383, 390; Ready v. Bragg, 1 Head, 511, 515, 516.

2 Wales v. Newbould, 9 Mich. 45, 64; *infra*, n. 11.

3 Wales v. Newbould, 9 Mich. 45, 64; *ante*, § 86.

- 4 Consult *Tyson*, 54 Md. 35, 38; *ante*, §§ 42, 127.
- 5 *Plummer v. Jarman*, 44 Md. 632, 638.
- 6 *Harris v. Brown*, 30 Ala. 401, 402; *ante*, § 105, n. 22.
- 7 *Wilson v. Sheppard*, 28 Ala. 623, 629.
- 8 *Ready v. Bragg*, 1 Head, 511, 515.
- 9 *Gorman v. Wood*, 163 Ga. 524; *Darnaby*, 14 Bush, 485, 488. Consult *ante*, § 100.
- 10 *Eykyn*, Law R. 6 Ch. Div. 115, 118; *Jackson*, 91 U. S. 122, 125; *Ward*, 36 Ark. 586, 588; *Andrews v. Oxley*, 38 Iowa, 578, 580; *Edgerly*, 112 Mass. 175, 179; *Darner*, 58 Mo. 222, 227; *Linker*, 32 N. J. Eq. 174, 177; *Scott v. Simes*, 10 Bosw. 314, 319; *Irvine v. Greever*, 32 Gratt. 411, 417; *Bent*, 44 Vt. 555, 559.
- 11 See *Marshall v. Curtwell*, Law R. 20 Eq. 328, 331; *Higgins*, 46 Cal. 257, 263; *Wormley*, 98 Ill. 544; *Darner*, 58 Mo. 222, 227; *Linker*, 32 N. J. Eq. 174, 177; *Dunn v. Hornbeck*, 7 Hun, 629, 630; *Irvine v. Greever*, 32 Gratt. 411, 418; *Bent*, 44 Vt. 555, 559.
- 12 *Bent*, 44 Vt. 555, 559.
- 13 *Marshall v. Curtwell*, Law R. 20 Eq. 328, 331.
- 14 *Dunn v. Hornbeck*, 7 Hun, 629, 630.
- 15 *Jackson*, 91 U. S. 122, 125; *Ward*, 36 Ark. 586, 588; *Peck v. Brummagin*, 31 Cal. 440, 447; *Ramsdell v. Fuller*, 28 Cal. 37, 43; *Wing v. Goodman*, 75 Ill. 159, 163; *Indianapolis v. McLaughlin*, 77 Ill. 275, 278; *Garner v. Graves*, 54 Ind. 188, 192; *Snow v. Paine*, 114 Mass. 520, 526; *McCowan v. Donaldson*, 128 Mass. 169, 170.
- 16 *Adams v. Brackett*, 5 Met. 280, 286.
- 17 See *Wing v. Goodman*, 75 Ill. 159, 163; *Shepard v. Pratt*, 32 Iowa, 296, 298, 301; *Baker v. Dobyns*, 4 Dana, 220, 225; *Duhme v. Young*, 3 Bush, 343, 349, 351; *Hearn v. Lander*, 11 Bush, 669, 676; *Low v. Marco*, 53 Me. 45, 49; *Warner v. Dove*, 33 Md. 579, 586; *Matthews v. Torinus*, 22 Minn. 132, 135; *Rogers v. McCauley*, 22 Minn. 384, 386; *Hill v. Bugg*, 52 Miss. 397, 401; *Rose v. Brown*, 11 W. Va. 122, 136; *ante*, §§ 113-117.
- 18 *Ante*, § 116.
- 19 *Shepard v. Pratt*, 32 Iowa, 296, 301; *Duhme v. Young*, 3 Bush, 343, 349; *Warner v. Dove*, 33 Md. 579, 584; *ante*, § 116.
- 20 *Ante*, § 117.
- 21 *Duhme v. Young*, 3 Bush, 343, 349; *Matthews v. Torinus*, 22 Minn. 132, 135; *ante*, § 117.
- 22 *Hardin v. Darwin*, 66 Ala. 55, 61, 62; *post*, § 450.
- 23 *Shepard v. Pratt*, 32 Iowa, 296, 298, 300; *Hearn v. Lander*, 11 Bush, 669, 676; *Hill v. Bugg*, 52 Miss. 397, 401. Consult *ante*, § 106.
- 24 *Seitz v. Mitchell*, 94 U. S. 580, 582; *Rose v. Brown*, 11 W. Va. 122, 136.
- 25 *Higgins*, 46 Cal. 257, 263; *Ramsdell v. Fuller*, 28 Cal. 37, 42; *McDonald v. Badger*, 23 Cal. 393, 398; *Houston v. Curl*, 8 Tex. 242; 58 Am. Dec. 110. Consult *supra*, notes 1-9.
- 26 *Hopkins v. Carey*, 23 Miss. 54, 58.
- 27 *Grain v. Shipman*, 45 Conn. 572, 583. Consult *ante*, § 106.
- 28 *Hill v. Bugg*, 52 Miss. 397, 401; *ante*, § 124.
- 29 *Adlard*, 65 Ill. 212, 216, 217; *Darner*, 58 Mo. 222, 227.
- 30 *Darner*, 58 Mo. 222, 227.

31 Consult *supra*, notes 11-14.

32 *Hardin v. Darwin*, 66 Ala. 55, 65; *Adlard*, 65 Ill. 212, 216. Does husband have to prove gift: *Supra*, notes 3, 4.

33 *Marshall v. Curtwell*, Law R. 20 Eq. 328, 331; *Hopkins v. Carey*, 23 Miss. 54, 58.

34 *Adlard*, 65 Ill. 212, 217, 218.

35 *Jacobs v. Miller*, 50 Mich. 119, 124, realty; *Eykyn*, Law R. 6 Ch. Div. 115, 118, personalty.

36 *Low v. Marco*, 53 Me. 45, 49.

§ 133. Insurance of husband's life for benefit of wife. —

A wife has a direct interest in the life of her husband,<sup>1</sup> which may be insured by him (and by her under special statutes<sup>2</sup>) for her benefit.<sup>3</sup> When such insurance has been made the policy is her separate property,<sup>4</sup> the proceeds belong not to the community but to her and her representatives;<sup>5</sup> she may assign it,<sup>6</sup> even for her husband's debt,<sup>7</sup> but such assignment must be free from fraud<sup>8</sup> and duress;<sup>9</sup> but he cannot assign it<sup>10</sup> or defeat her rights, as by a fraudulent surrender;<sup>11</sup> nor can either of them so defeat the rights of children who are also beneficiaries;<sup>12</sup> still, if he survives her he may surrender a policy taken out for her benefit,<sup>13</sup> or dispose of it by will,<sup>14</sup> or have another person, as a second wife, made beneficiary.<sup>15</sup> Her separate estate is not however liable for the premiums.<sup>16</sup> If a husband assigns a policy for his benefit to his wife for hers, it may, just as any other assignment,<sup>17</sup> be a fraud on his creditors;<sup>18</sup> so if he surrenders a policy in his name and takes out one in hers,<sup>19</sup> for this is really an assignment;<sup>20</sup> so if he makes a large and unreasonable insurance in her favor when he is indebted;<sup>21</sup> but even against creditors he may insure his life for her benefit for a reasonable amount.<sup>22</sup> Statutes often exempt insurance policies from the claims of creditors.<sup>23</sup>

1 *Gambs v. Covenant*, 50 Mo. 44, 47.

2 *Thompson v. American*, 46 N. Y. 674, 675; *post*, § 393.

3 *Gambs v. Covenant*, 50 Mo. 44, 47.



- 4 *Pomeroy v. Manhattan*, 40 Ill. 399, 402; *Southern v. Booker*, 9 Heisk. 606, 618.
- 5 *Bofenschen*, 29 La. An. 711, 714.
- 6 *Godfrey v. Wilson*, 70 Ind. 50, 56; *Whitridge v. Barry*, 42 Md. 140, 152; *Ainsworth v. Backus*, 5 Hun. 414, 417; *post*, § 236.
- 7 *Emerick v. Coakley*, 35 Md. 188, 190; *post*, § 134.
- 8 *Ante*, § 110.
- 9 *Emerick v. Coakley*, 35 Md. 188, 190; *Whitridge v. Barry*, 42 Md. 140, 152; *Fowler v. Butterly*, 78 N. Y. 68; 34 Am. Rep. 507; *ante*, § 110.
- 10 See *Knickerbocker v. Weitz*, 99 Mass. 157, 159; *Barry v. Mutual*, 49 How. Pr. 504, 508; *Southern v. Booker*, 9 Heisk. 606, 618, 619.
- 11 *Barry v. Mutual*, 49 How. Pr. 504, 508.
- 12 *Meller*, Law R. 6 Ch. Div. 127, 128. Consult *supra*, n. 10.
- 13 *Gambs v. Covenant*, 50 Mo. 44, 47; *Kerman v. Howard*, 23 Wis. 108, 112.
- 14 *Kerman v. Howard*, 23 Wis. 108, 112.
- 15 *Gambs v. Covenant*, 50 Mo. 44, 47.
- 16 *Ogden v. Guill*, 56 Miss. 330, 332.
- 17 *Ante*, §§ 113-117.
- 18 *Elliott*, 50 Pa. St. 75, 83. See English M. Woman's Act 1882, § 11.
- 19 *Stokes v. Coffey*, 8 Bush. 533, 538.
- 20 That is to say, it is an indirect transfer: See *ante*, § 99.
- 21 *Stokes v. Coffey*, 8 Bush. 533, 538.
- 22 *Smedley v. Felt*, 43 Iowa, 607, 608; *Stokes v. Coffey*, 8 Bush. 530, 538; *Elliott*, 50 Pa. St. 78, 83; *Southern v. Booker*, 9 Heisk. 606, 618.
- 23 Md. R. C. 1878, p. 483, § 26.

§ 134. **Wife as surety for her husband.**—Contracts and conveyances by a wife for the benefit of her husband's creditors are in reality indirectly contracts and conveyances with him.<sup>1</sup> But special considerations have arisen with reference to the wife's capacity to be surety for her husband, and to the incidents of her suretyship.<sup>2</sup>

1. *Capacity under general powers.* In the absence of express prohibition in the settlement or statute whence she derives her capacity to contract,<sup>3</sup> a wife can to the full extent of that capacity, equitable<sup>4</sup> or statutory,<sup>5</sup> contract as surety for her husband.<sup>6</sup> Thus, mortgages by wife for husband's debts are common,<sup>7</sup> so are assignments of personalty;<sup>8</sup> and a married woman who can make a promissory note<sup>9</sup> can indorse one for

her husband.<sup>10</sup> For, as to her equitable separate estate she may do as she pleases<sup>11</sup> It is, however, necessary to note that the different rules which prevail as to when a contract of hers binds this estate<sup>12</sup> apply also to her contracts of suretyships, and while in some States any such contract binds it,<sup>13</sup> in others the contract must be for its benefit,<sup>14</sup> or expressly charge it.<sup>15</sup> As to her statutory, separate estate, since the statute does not prohibit her dealing with it for the benefit of others, and since no special incapacity to do so exists by the unwritten law, she may pledge or convey it for her husband's debt.<sup>16</sup> For the same reasons there is no ground for engrafting on general enabling acts an exception as to suretyship.<sup>17</sup>

2. *Capacity limited by statute.* In some States statutes expressly,<sup>18</sup> or by necessary implication,<sup>19</sup> prohibit a wife's contracts as surety for her husband.<sup>20</sup> But such is not the effect of statutes forbidding contracts between husband and wife,<sup>21</sup> or providing that a wife's property shall not be liable for her husband's debts.<sup>22</sup> Nor does a statute which prohibits such contracts as to her statutory separate property affect her capacity as to her equitable separate property.<sup>23</sup>

3. *Contract otherwise binding.* The contract must, however, not only be one which, though a married woman, she has capacity to make,<sup>24</sup> but also one which would bind her as surety if unmarried.<sup>25</sup> Thus, there must be a consideration,<sup>26</sup> though it need not move to her;<sup>27</sup> if she becomes security for a debt before it is contracted, or afterwards in accordance with a prior understanding, the debt itself is a binding consideration;<sup>28</sup> but if the debt has already been contracted, she cannot render herself liable therefor without some new consideration,<sup>29</sup> such as an extension of time,<sup>30</sup> or a forbearance to sue,<sup>31</sup> and the statute of frauds requiring a

memorandum of a promise to answer for the debt, etc., of another, applies equally to such promises by married women.<sup>32</sup> If her contract has been secured by the creditor's illegal threats<sup>33</sup> or duress<sup>34</sup> she is not bound; but fraud on the part of her husband alone will not affect her liability;<sup>35</sup> still she is more readily relieved for fraud than a stranger to her husband would be.<sup>36</sup>

4. *Implied suretyship.* Whenever a wife conveys or mortgages her property, or binds herself for her husband's debt she does so *prima facie* simply as his surety;<sup>37</sup> but whether she is so or not depends upon her intent,<sup>38</sup> and the debt may be shown to have really been hers.<sup>39</sup> Nor is she a surety as far as concerns creditors if she is one of the original contractors and nothing else appears.<sup>40</sup>

5. *Incidents of her suretyship.* Whenever a wife is expressly or impliedly, as above, surety for her husband, she has the same rights as other sureties.<sup>41</sup> Thus, she has her equity of exoneration.<sup>42</sup> She may not only, if she has paid his debt, go against him for reimbursement *pari passu* with his other creditors,<sup>43</sup> being subrogated to the rights of the creditor she has paid,<sup>44</sup> but she may compel him or his representatives to redeem her goods which have been pledged for his debt;<sup>45</sup> and after his death she<sup>46</sup> or her representative<sup>47</sup> or her creditor<sup>48</sup> may have her property exonerated of its liability out of his real and personal estate.<sup>49</sup> As in the case of other sureties she may compel the creditor to first exhaust the principal's means;<sup>50</sup> if any of his securities are released,<sup>51</sup> or his time is extended,<sup>52</sup> or if he buys the debt,<sup>53</sup> she is discharged. If her mortgaged estate is sold for her husband's debt under decree, she may have a decree over against him.<sup>54</sup>

6. *Authorities.* The authorities on this subject in the several States are very numerous and are collected in a note.<sup>55</sup>

1 But see *Major v. Holmes*, 124 Mass. 108, 109. Indirect contracts between husband and wife were always valid: *Ante*, § 42.

2 See cases collected *infra*, n. 55.

3 A married woman having no capacity to contract at common law can do so only in equity or by statute: *Post*, CONTRACTS OF MARRIED WOMEN, §§ 355-393.

4 Compare *Perkins v. Elliott*, 23 N. J. Eq. 526, 528, 533; and *Muller v. Bayley* 21 Gratt. 521, 529.

5 Compare *Wolff v. Van Meter*, 19 Iowa, 134, 136; and *Woolsey v. Brown*, 74 N. Y. 82, 84.

6 *Greiner*, 58 Cal. 115, 122; *Collins v. Dawley*, 4 Colo. 138; *Ayres v. Husted*, 15 Conn. 504, 517; *Edwards v. Schoeneman*, 104 Ill. 278, 285; *Hubble v. Wright*, 23 Ind. 322, 324; *Low v. Anderson*, 41 Iowa, 476, 478; *Latimer v. Glenn*, 2 Bush, 535, 543; *Mayo v. Hutchinson*, 57 Me. 546, 577; *Emerick v. Coakley*, 35 Md. 188, 190; *Hall v. Tay*, 131 Mass. 192, 193; *Watson v. Thurber*, 11 Mich. 457; *Stone v. Montgomery*, 35 Miss. 83, 104; *Wilcox v. Todd*, 64 Mo. 388, 389; *Harrall*, 31 N. J. Eq. 101, 102; *Woolsey v. Brown*, 74 N. Y. 82, 84; *Purvis v. Carstaphan*, 73 N. C. 575, 581; *Baldwin v. Snowden*, 11 Ohio St. 203, 211; *Moore v. Fuller*, 6 Oreg. 272; 25 Am. Rep. 524; *Haffey v. Carey*, 73 Pa. St. 431, 432; *McFerrin v. White*, 6 Cold. 499; *Rhodes v. Gibbs*, 39 Tex. 432; *Muller v. Bayley*, 21 Gratt. 521, 529; cases collected *infra*, n. 55.

7 *Short v. Battle*, 52 Ala. 456, 460; *Spear v. Ward*, 20 Cal. 660, 674; *Young v. Graff*, 28 Ill. 20; *Brockschmidt v. Hogebrush*, 72 Ill. 562; *Washburn v. Roesch*, 13 Ill. App. 263, 272; *Hubble v. Wright*, 23 Ind. 322, 324; *Moffit v. Roche*, 77 Ind. 48, 51; *Wolff v. Van Meter*, 23 Iowa, 297; *Green v. Scranage*, 19 Iowa, 461, 465; *Comegy v. Clark*, 44 Md. 103. 111; *Heburn v. Warner*, 112 Mass. 271, 275; *Smith v. Osborn*, 33 Mich. 410; *Amstrong v. Stovall*, 26 Miss. 275, 280; *Schneider v. Stair*, 20 Mo. 269; *Wilcox v. Todd*, 64 Mo. 388, 389; *Robbins v. Abrahams*, 5 N. J. Eq. 465; *Bank v. Burns*, 46 N. Y. 170, 175; *McVey v. Cantrell*, 70 N. Y. 295, 297; 26 Am. Rep. 605; *Purvis v. Carstaphan*, 73 N. C. 575, 581; *Moore v. Fuller*, 6 Oreg. 272; 25 Am. Rep. 524; *Bayler v. Com.* 40 Pa. St. 37-43; *Jamison*, 3 Whart. 457; *Lytle*, 36 Pa. St. 131, 133; *McFerrin v. White*, 6 Cold. 499; *Rhodes v. Gibbs*, 39 Tex. 432; *Muller v. Boyly*, 21 Gratt. 521, 523. See also *infra*, n. 55.

8 *Collins v. Dawley*, 4 Colo. 138; 34 Am. Rep. 72; *Pomeroy v. Manhattan*, 40 Ill. 393; *Emerick v. Coakley*, 35 Md. 188, 190.

9 *Post*, ch. xxi, § 385.

10 *Major v. Holmes*, 124 Mass. 108, 109; *Kenworthy v. Sawyer*, 125 Mass. 23, 29; *Goodnow v. Ifill*, 125 Mass. 587, 589. Compare *De Vries v. Conklin*, 22 Mich. 255, 258, 260; *Sawyer v. Fernald*, 59 Me. 500, 502.

11 *Muller v. Bayley*, 21 Gratt. 521, 529; *post*, §§ 206, 207.

12 As to these rules see *post*, §§ 205-207.

13 See *Nunn v. Glohaa*, 45 Ala. 370, 375; *Short v. Battle*, 52 Ala. 456, 460; *Deering v. Boyle*, 8 Kan. 525; 12 Am. Rep. 480; *post*, § 207.

14 See *Willard v. Eastham*, 15 Gray, 323, 335; *Athol v. Fuller*, 107 Mass. 437, 439; *Perkins v. Elliott*, 23 N. J. Eq. 526, 528, 533; *Gosman*, 63 N. Y. 87; 25 Am. Rep. 141; *Hansee v. Dewitt*, 63 Barb. 53; *Bogert v. Gulick*, 65 Barb. 322; *Hartman v. Ogborn*, 54 Pa. St. 120, 122; *post*, § 207.

15 See *McVey v. Cantrell*, 70 N. Y. 295, 297; *Perkins v. Elliott*, 23 N. J. Eq. 526, 528, 533; *post*, §§ 206, 207.

16 See *Low v. Anderson*, 41 Iowa, 476, 468; *post*, §§ 206, 207.

17 See *Low v. Anderson*, 41 Iowa, 476, 478; *Mayo v. Hutchinson*, 57 Me. 546, 547; *Kenworthy v. Sawyer*, 125 Mass. 28, 29; *Woolsey v. Brown*, 74 N. Y. 82, 84; *Com. v. Babcock*, 42 N. Y. 613. The cases in the last five notes are merely illustrative of the text.

18 Ga. R. C. 1783; *Ind. R. S.* 1881, § 5119; *N. J. Rev.* 1877, p. 637.

19 *Bibb v. Pope*, 43 Ala. 190, 200; *Bowman v. Kaufman*, 30 La. An. 1021, 1025.

20 See also *Northington v. Farber*, 52 Ala. 45, 47; *Dunbar v. Mize*, 53 Ga. 435, 437; *Foxworth v. Magee*, 44 Wls. 430; *Erwin v. Hill*, 47 Miss. 675; *infra*, n. 55, Ala. Ga. and Miss. cases.

21 *Major v. Holmes*, 124 Mass. 108, 109; *Mass. R. S.* 1882, p. 819, § 2.

22 *Hubble v. Wright*, 23 Ind. 322, 324.

23 Compare *Short v. Battle*, 52 Ala. 456, 460; with *Northington v. Farber*, 52 Ala. 45, 47.

24 *Schmidt v. Postel*, 63 Ill. 59, 60; *Doyle v. Kelly*, 75 Ill. 574; *O'Daily v. Morris*, 31 Ind. 111, 115; *Wolff v. Van Metre*, 19 Iowa, 124, 136; *West v. Laraway*, 28 Mich. 464, 465.

25 *Hetherington v. Hixon*, 46 Ala. 297, 298; *Sawyer v. Fernald*, 59 Me. 500, 502; *De Vries v. Conklin*, 22 Mich. 255, 258, 260; *Bayler v. Com.* 40 Pa. St. 37, 44; *Hatz*, 40 Pa. St. 209, 212; *White*, 36 Pa. St. 134, 140. See *Baylie's on Sureties*, ch. 4.

26 *Sawyer v. Fernald*, 59 Me. 500, 502; *supra*, n. 25.

27 *Hall v. Tay*, 131 Mass. 192, 193.

28 See *Baylies on Sureties*, ch. 4.

29 *De Vries v. Conklin*, 22 Mich. 255, 258, 260; *supra*, n. 25.

30 *Green v. Scranage*, 19 Iowa, 461, 465; *Low v. Anderson*, 41 Iowa, 476, 478.

31 *Emerick v. Coakley*, 35 Md. 188, 190.

32 29 Car. 2, ch. 3, § 4; *Alex. Brit. Stat.* p. 527.

33 *Green v. Scranage*, 19 Iowa, 461, 465; *McGrary v. Reilley*, 14 Phila. 111, 112.

34 *Eadle v. Simmons*, 26 N. Y. 9, 12.

35 *Rogers v. Adams*, 63 Ala. 600, 602; *Collins v. Wassell*, 34 Ark. 17, 35; *Green v. Scranage*, 19 Iowa, 461, 465; *Baldwin v. Snowden*, 11 Ohio St. 203, 211; *ante*, § 110.

36 *Hammit v. Bull*, 8 Phila. 23, 30; *ante*, § 110.

37 *Huntington*, 2 Bro. P. C. 1; 2 *White & T. Lead. Cas.* 1010; *Hassey v. Wilke*, 38 Hun. 525, 528; *Spear v. Ward*, 20 Cal. 660, 674; *Ayres v. Husted*, 15 Conn. 504, 517; *Latimer v. Glenn*, 2 Bush. 535, 543; *Johns v. Reardon*, 11 Md. 465, 469; *Knight v. Whitehead*, 26 Miss. 245, 246; *Wilcox v. Todd*, 64 Mo. 383, 389; *Loomer v. Wheelwright*, 3 Sand. Ch. 15, 154; *Bank v. Burns*, 46 N. Y. 170, 175; *Purvis v. Carstaphan*, 73 N. C. 575, 581; *Mher v. Graham*, 24 Pa. St. 491, 495; *Hammit v. Bull*, 8 Phila. 29, 30; *infra*, notes 41-54. This does not apply to her release of dower: *Hawley v. Bradford*, 9 Paige, 200, 201.

38 *Duffy v. Insurance*, 8 Watts & S. 413, 433.

39 *Clinton v. Hooper*, 3 Bro. C. C. 212, 213, 1 Ves. Jr. 173; *Kinnoul v. Money*, 3 Swanst. 203 n.; *Spear v. Ward*, 20 Cal. 660, 674.

40 *Alexander v. Bouton*, 55 Cal. 15, 19; *Ward v. Spear*, 20 Cal. 660, 677.

41 Wilcox v. Todd, 64 Mo. 388, 389; VanHorne v. Everson, 13 Barb. 526, 540; Bank v. Burns, 46 N. Y. 170, 175; Hawley v. Bradford, 9 Paige, 200, 201; Sheidle v. Weishlee, 16 Pa. St. 134, 137.

42 Huntington, 2 Brown Parl. C. 1; 2 White & T. Lead. Cas. 1010; Johns v. Rearden, 11 Md. 465, 460; Butterfield v. Stanton, 44 Miss. 15. 31; Wilcox v. Todd, 64 Mo. 388, 389; Shinn v. Smith, 79 N. C. 310.

43 Gleaves v. Paine, 1 DeGex J. & S. 87, 95, 96; *infra*, n. 42.

44 Greiner, 58 Cal. 115, 122; 12 The Reporter, 647; *supra*, n. 42.

45 Harrall, 31 N. J. Eq. 101, 102.

46 Aguilar, 5 Madd 414; Stewart M. & D. § 460.

47 Huntingdon, 2 Brown Parl. C. 1; 2 White & T. Lead. Cas. 1010, 1015.

48 Lancaster v. Evans, 10 Beav. 154, 266; *supra*, n. 47.

49 Ayres v. Husted, 15 Conn. 504, 517; Johns v. Rearden, 11 Md. 465, 470; Knight v. Whitehead, 26 Miss. 245, 246; Fitch v. Cotheal, 2 Sand. Ch. 29, 30; Miner v. Graham, 24 Pa. St. 491, 495; Weeks v. Haas, 3 Watts & S. 520, 523; 39 Am. Dec. 39; *supra*, n. 42.

50 Moffit v. Roche, 77 Ind. 43, 51; Wilcox v. Todd, 64 Mo. 388 389; Sheidle v. Weishlee, 16 Pa. St. 134, 137.

51 Purvis v. Carstaphan, 73 N. C. 575, 582.

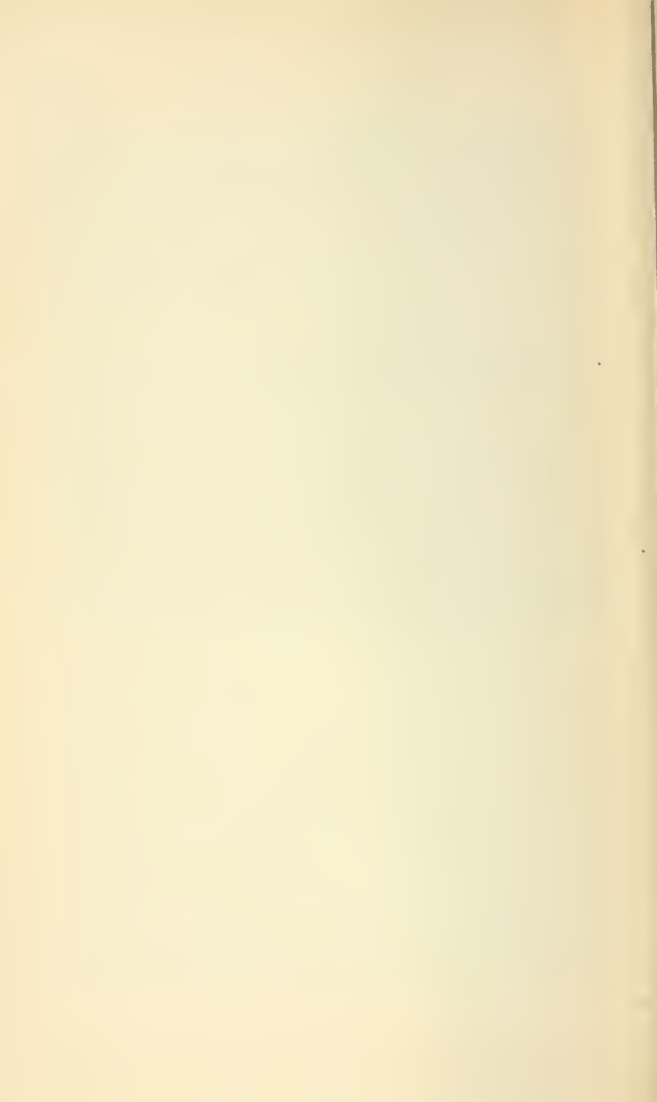
52 Spear v. Ward, 20 Cal. 660, 674; Frickee v. Donner, 55 Mich. 151; Smith v. Townsend, 25 N. Y. 479, 483; Bank v. Burns, 46 N. Y. 170, 175; but see Lytle, 36 Pa. St. 131, 133; *supra*, n. 40.

53 Fitch v. Cotheal, 2 Sand. Ch. 29, 30.

54 Nelmcelnez v. Gahn, 3 Paige, 614.

55 Huntingdon, 2 Brown Parl. C. 1; 2 White & T. Lead. Cas. 1010; Rogers v. Adams, 66 Ala. 600, 602; Coleman v. Smith, 55 Ala. 363; Cowler v. Marks, 53 Ala. 490; 47 Ala. 612; Matthews v. Sheldon, 53 Ala. 136; Short v. Battle, 52 Ala. 456, 460; Northington v. Farber, 52 Ala. 45, 47; Davidson v. Lanier, 57 Ala. 318; Riley v. Pierce, 50 Ala. 93; Hetherington v. Hixon, 46 Ala. 297, 298; Minn v. Gohan, 45 Ala. 370, 375; Wilkinson v. Cheatham, 45 Ala. 377; Ebb v. Pope, 43 Ala. 190; 200; Collins v. Wassell, 34 Ark. 17, 31; Greiner, 58 Cal. 115, 122; Alexander v. Bouton, 55 Cal. 15, 19; Hassey v. Wilke, 55 Cal. 525, 528; Marlow v. Barlew, 53 Cal. 456; Ward v. Spear, 20 Cal. 660, 674, 677; Collins v. Dawley, 4 Colo. 138; 34 Am. Rep. 72; Ayres v. Husted, 15 Conn. 504, 517; Ga. Code 1873, § 1783; Dunbar v. Mize, 53 Ga. 435, 437; Clark v. Valentine, 41 Ga. 143; Edwards v. Schoeneman, 104 Ill. 278, 235; Doyle v. Kelly, 63 Ill. 594; Brockschmidt v. Hagebrush, 72 Ill. 562; Young v. Graff, 28 Ill. 20; Pomeroy v. Manhattan, 40 Ill. 318; Schmidt v. Postel, 63 Ill. 59, 60; Washburn v. Roesch, 13 Ill. App. 263, 272; Ind. R. S. 1881, § 5119; Moffit v. Roche, 77 Ind. 43; Buel v. Shuman, 28 Ind. 461; Herron, 91 Ind. 273; O'Daily v. Morris, 31 Ind. 111, 115; Coates v. McKee, 26 Ind. 223; Ellis v. Kenyon, 25 Ind. 134; Hubbell v. Wright, 23 Ind. 322, 324; Kirk v. Tort, 13 Ind. 56; Iowa R. C. 1880, § 2506; Low v. Anderson, 41 Iowa, 476, 478; Wolff v. Van Meter, 23 Iowa, 297; 19 Iowa, 134, 136; Reil v. King, 23 Iowa, 500; Green v. Scranage, 19 Iowa, 461, 465; Hobson, 8 Bush, 665; Latimer v. Glenn, 2 Bush, 535, 543; Bowman v. Kaufman, 30 La. An. 1021, 1025; Keller v. Rulz, 21 La. An. 283; Sawyer v. Fernald, 59 Me. 500, 502; Mayo v. Hutchinson, 57 Me. 546, 547; Eaton v. Mason, 47 Me. 132; Comegys v. Clark, 44 Md. 103, 111; Hall v. Eccleston, 37 Md. 510, 520; Emerick v. Coakley, 35 Md. 188, 190; Hall v. Tay, 131 Mass. 192, 193; Goodnow v. Hill, 125 Mass. 587, 589; Kenworthy v. Sawyer, 125 Mass. 23, 29; Major v. Holmes, 123 Mass. 108, 109; Thacker v. Churchill, 118 Mass. 108, 109; Heburn v.

Warner, 112 Mass. 271, 276; *Athol v. Fuller*, 107 Mass. 437, 439; *Willard v. Eastham*, 15 Gray, 323, 335; *Bartlett*, 4 Allen, 440, 443; *Frickee v. Donner*, 35 Mich. 151; *Smith v. Osborn*, 33 Mich. 410; *Denison v. Gibson*, 24 Mich. 187; *West v. Laraway*, 28 Mich. 464, 465; *De Vries v. Conklin*, 22 Mich. 255, 253, 260; *Watson v. Thurber*, 11 Mich. 257; *Wolf v. Binning*, 3 Minn. 202; *Klein v. McNamara*, 54 Miss. 90; *Viser v. Scruggs*, 49 Miss. 705; *Erwin v. Hill*, 47 Miss. 665; *Foxworth v. Magee*, 44 Miss. 420; *Butterfield v. Stanton*, 44 Miss. 15, 33; *McGavock v. Whitfield*, 45 Miss. 452; *Stone v. Montgomery*, 35 Miss. 83, 104; *Knight v. Whithead*, 26 Miss. 245, 246; *Armstrong v. Stovall*, 26 Miss. 275, 280; *Wilcox v. Todd*, 64 Mo. 388, 389; *Brown*, 47 Mo. 130; 4 Am. Rep. 320; *Thompson v. Ella*, 53 N. H. 490; N. J. Rev. 1877, p. 637; *Ferdon v. Miller*, 34 N. J. Eq. 10, note, cases collected; *Merchant v. Thompson*, 34 N. J. Eq. 73; *Campbell v. Tompkins*, 32 N. J. Eq. 170; *Conover v. Grover*, 31 N. J. Eq. 539; *Harrall*, 31 N. J. Eq. 101, 102; *Perkins v. Elliott*, 23 N. J. Eq. 526, 528; *Hanford v. Bockee*, 20 N. J. Eq. 101; *Woolsey v. Brown*, 74 N. Y. 82, 94; *McVey v. Cantrell*, 70 N. Y. 295, 297; *Com. v. Babcock*, 42 N. Y. 613; *Gosman*, 69 N. Y. 87; 25 Am. Rep. 141; *Bank v. Burns*, 46 N. Y. 170, 175; *Smith v. Townsend*, 25 N. Y. 479, 483; *Miller v. Lockwood*, 32 N. Y. 293; *Eadie v. Simmons*, 26 N. Y. 9, 12; *Bogert v. Gulick*, 65 Barb. 322; *Hausse v. Dewitt*, 63 Barb. 53; *Todd v. Ames*, 69 Barb. 454; *Van Horne v. Everson*, 13 Barb. 526, 550; *Hawley v. Bradford*, 9 Paige, 200, 201; *Neimecwiez v. Gahn*, 3 Paige, 614; *Loomer v. Wheelright*, 3 Sand. Ch. 135, 155; *Fitch v. Cotteal*, 2 Sand. Ch. 29, 30; *Purvis v. Carstaphan*, 73 N. C. 575, 581; *Baldwin v. Snowden*, 11 Ohio St. 203, 211; *Moore v. Fuller*, 6 Oreg. 272; 25 Am. Rep. 524; *Haffey v. Carey*, 73 Pa. St. 432, 432; *Selden v. Merchants*, 69 Pa. St. 424; *Harman v. Ogborn*, 54 Pa. St. 120, 122; *Bayler v. Com.* 40 Pa. St. 37, 40; *Hotz*, 40 Pa. St. 209, 212; *White*, 36 Pa. St. 134, 140; *Lytle*, 36 Pa. St. 131, 133; *Block v. Galway*, 24 Pa. St. 18; *Sheidle v. Weisklee*, 16 Pa. St. 134, 137; *Jamison*, 3 Whart. 457; *Weeks v. Haas*, 3 Watts & S. 520, 523; 39 Am. Dec. 39; *Duffy v. Insurance*, 8 Watts & S. 413, 433; 31 Am. Dec. 536; *McFerrin v. White*, 6 Cold. 499; *McCline v. Harris*, 7 Heisk. 379; *Rhodes v. Gibbs*, 39 Tex. 432; *Covington v. Burleson*, 28 Tex. 363; *Hutchinson v. Underwood*, 27 Tex. 255; *Shelby v. Burtis*, 18 Tex. 644; *Muller v. Bayly*, 21 Gratt. 521, 529.





## PART III.

### ESTATES OF HUSBAND AND WIFE.

- CHAP. VII. ESTATES IN GENERAL, §§ 135-139.
- VIII. HUSBAND'S ESTATE IN HIS OWN PROPERTY, § 140.
- IX. HUSBAND'S ESTATES IN WIFE'S REALTY, §§ 141-162.
- X. HUSBAND'S ESTATES IN HIS WIFE'S PERSONALTY, §§ 163-183.
- XI. WIFE'S ESTATES IN HER OWN PROPERTY, §§ 184-196.
- XII. WIFE'S EQUITABLE SEPARATE ESTATE, §§ 197-216.
- XIII. WIFE'S STATUTORY SEPARATE ESTATE, §§ 217-243.
- XIV. WIFE'S ESTATE IN HUSBAND'S REALTY DOWER, §§ 244-300.
- XV. WIFE'S ESTATE IN HUSBAND'S PERSONALTY, § 301.
- XVI. HUSBAND AND WIFE'S ESTATES IN PROPERTY OF BOTH, §§ 302-311.
- XVII. COMMUNITY PROPERTY OF HUSBAND AND WIFE, §§ 312-319.
- XVIII. HOMESTEAD PROPERTY OF HUSBAND AND WIFE, §§ 320-330.

## CHAPTER VII.

### ESTATES OF HUSBAND AND WIFE, IN GENERAL.

- § 135. Term "estate," how used.
- § 136. Estates in realty and personalty.
- § 137. General effect of marriage on property rights.
- § 138. General effect of death or divorce.
- § 139. Estates divided and enumerated.

§ 135. Term "estate," how used.—The word "estate" is for property what status is for persons. It means the relations of property towards the person or persons who have rights in it, the conditions under which they hold it. And the scope of this part of this work is a discussion of the special conditions arising from marriage under which husband and wife hold, or the special relations in which they stand to, their own and each others property.

§ 136. Estates in realty and personalty.—The term "estate" is strictly applicable only to realty,<sup>1</sup> for under the early common law the character of personalty was such that personalty could not be held for a term or for life, but only absolutely.<sup>2</sup> Such a narrow meaning of the word has, however, now been generally adandoned, and in this work "estate" in property means simply the conditions under which the property is held.<sup>3</sup> For various reasons the estates of husband and wife in realty have differed widely from those in personalty, and in particular the husband's estate in his wife's personalty has been far greater than his estate in her realty;<sup>4</sup> so that it is important to consider whether realty is even treated as personalty, and what happens if realty is changed into personalty, and *vice versa*.

1. Generally, partnership lands bought for partner-

ship purposes is in equity treated as personalty, and a partner's husband or wife has only personalty rights therein.<sup>5</sup>

2. Money devised, etc., to be "laid out in land" is in equity treated as land;<sup>6</sup> and land devised, etc., "to be sold" is in equity treated as personal property.<sup>7</sup>

3. The rights of a widow<sup>8</sup> or a widower<sup>9</sup> in the deceased's realty are not changed after they have once vested by the conversion of the realty into personalty.

4. When a wife's lands are converted into personalty *with her consent*, and the purchase money is paid to her or her husband, he has the same rights in it as he has in her other money;<sup>10</sup> but any prior agreement between them as to the disposition of such money may be enforced in equity;<sup>11</sup> and if in accordance with such an agreement such money has been invested in other land, such other land will be hers, subject to his marital rights,<sup>12</sup> unless he has waived them,<sup>13</sup> or the original land was separate property.<sup>14</sup> If the purchase money is not paid but is secured, as by notes, and the notes are payable to him, they are *prima facie* his *choses in action*,<sup>15</sup> if payable to her, or to her and him, they are *prima facie* her *choses in action*.<sup>16</sup> If the purchase money is neither paid nor secured, an implied promise is raised to pay him and her in her right—it is her *chose in action*.<sup>17</sup>

5. When a wife's lands are converted into personalty *without her consent* in legal proceedings (as in a partition suit<sup>18</sup>), the proceeds are in equity treated as realty,<sup>19</sup> and her share will not be paid over without her formal consent,<sup>20</sup> but will be set off or invested in land, subject to the same legal rights as existed in the original lands.<sup>21</sup>

1 Williams Real Prop. 16; Boone Real Prop. § 13.

2 Williams Personal Prop. 7, 199.

3 *Ante*, § 135. Compare Boone Real Prop. § 13.

- 4 Compare *post*, §§ 141-162, with *post*, §§ 163-183.
- 5 1 Collyer Part. § 114, cases cited.
- 6 Sweetapple v. Bindon, 5 Vern. 536, 537; Dodson v. Hay, 3 Brown Ch. 401, 401; Fletcher v. Ashburner, 1 Brown Ch. 497, 499; Davis v. Mason, 1 Peters, 503, 507.
- 7 Fletcher v. Ashburner, 1 Brown Ch. 497, 499; Siter v. McClanahan, 2 Gratt. 280, 295.
- 8 Mann, 50 Pa. St. 375, 380.
- 9 Tollett v. Tyrer, 14 Sim. 125, 123; Dinscomb, 1 Johns. Ch. 508, 511; Clipper v. Livegood, 5 Watts, 113, 114; Eberts, 55 Pa. St. 110, 118.
- 10 Kesner v. Trigg, 98 U. S. 50, 54; Humphries v. Harrison, 30 Ark. 70, 83, 84; Fourth v. Mathew, 15 Conn. 588; Thomas v. Chicago, 55 Ill. 103; Lichtenberger v. Graham, 50 Ind. 288; Mahoney v. Bland, 14 Ind. 176; Pursley v. Hays, 22 Iowa, 11; Crosby v. Otis, 32 Me. 256, 259; Savage v. King, 17 Me. 301; Chase v. Palmer, 25 Me. 341; Plummer v. Jarman, 44 Md. 632, 637; Sabel v. Slingluff, 52 Md. 132, 135; Emerson v. Cutler, 14 Pick. 119; Tillman, 50 Mo. 40, 41; Hutchins v. Gilman, 9 N. H. 359; Johnson v. Bennett, 39 Barb. 237; Martin, 1 Comst. 473; Hackett v. Shuford, 86 N. C. 144, 149; Benedict v. Montgomery, 7 Watts & S. 238; Chester v. Greer, 5 Humph. 26, 34; Cox v. Scott, 9 Baxt. 305, 312; Cowden v. Pitts, 58 Tenn. 59, 60; Perkins v. Clements, 1 Pat. & H. 141; Ward v. Morrill, 1 Chip. D. 322, 329; Barber v. Slade, 30 Vt. 191; Ellsworth v. Hinds, 5 Wis. 613, 626; Hamlin v. Jones, 20 Wis. 536, 539.
- 11 Dula v. Young, 70 N. C. 450, 453. See Barnet v. Goings, 8 Black, 284; Bowie v. Stonestreet, 6 Md. 418; Dearing, 9 Paige, 283; Temple v. Williams, 4 Ired. Eq. 39; *ante*, § 42; *post*, §§ 99-134.
- 12 De Lonis v. Sage, 13 Iowa, 146, 147; Campbell v. Williams, 12 N. H. 362, 366; Davis, 60 Pa. St. 118; 42 Pa. St. 342.
- 13 *Post*, §§ 149, 159, 178.
- 14 Tillman, 50 Mo. 40, 41. See Rice v. Hoffman, 35 Md. 344, 351; *post*, § 209.
- 15 McCullough v. Ford, 96 Ill. 439; Talbot v. Dennis, 1 Cart. 471; Dixon, 18 Ohio, 113.
- 16 McCrary v. Foster, 1 Iowa, 271; Peacock v. Pembroke, 4 Md. 280, 282; Taggart v. Bouldin, 10 Md. 104, 116; Ramsdale v. Craighill, 9 Ohio, 199.
- 17 Higdon v. Thomas, 1 Hare & S. 139; Peacock v. Pembroke, 4 Md. 280, 282; Fenick v. Flagg, 30 N. J. L. 25.
- 18 Hughes, 1 Dev. Eq. 118, 119; *post*, § 280.
- 19 Rice v. Hoffman, 35 Md. 344, 351, 352; Mann, 50 Pa. St. 375, 380. See Athey v. Knotts, 6 Mon. B. 24; Ross v. Adams, 29 N. J. L. 160; Mathews v. Duryee, 45 Barb. 69; Ellsworth v. Cook, 8 Paige, 643; Hillenbeck v. Bradt, 2 Paige, 316; Finch, Clarke, 538; Bryan, 1 Dev. Eq. 47; Hughes, 1 Dev. Eq. 118; Mebane v. Yancy, 3 Ired. Eq. 88; Forbes v. Smith, 5 Ired. Eq. 369; Rives v. Dudley, 3 Jones Eq. 126; Jones v. Edwards, 8 Jones, 336; Scull v. Jernigan, 2 Dev. & B. Eq. 144; Stehman v. Huber, 21 Pa. St. 260; Com. v. Haffey, 6 Pa. St. 348; Lancaster v. Stauffer, 10 Pa. St. 398; Snively v. Wagner, 3 Pa. St. 275; Ferrie v. Com. 8 Serg. & R. 314; Blocher v. Carmony, 1 Serg. & R. 460; Tilgman, 5 Whart. 44; Weeks v. Haas, 3 Watts & S. 520; Mobley, 2 Rich. Eq. 56; Wardlaw v. Gray, 2 Hill Ch. 644. *Contra*, Jones v. Plummer, 20 Md. 416, 421.
- 20 Hallenbeck v. Bradt, 2 Paige, 316; Finch, Clarke, 538; Hughes, 1 Dev. Eq. 118.

21 *Cost v. Rose*, 17 Ill. 276, 278; *De Lonis v. Sage*, 13 Iowa, 146, 147; *Campbell v. Wallace*, 12 N. H. 362, 366; *Lippincott*, 8 N. J. L. 88, 89; *Noble v. Cromwell*, 26 Barb. 475, 480.

§ 137. **General effect of marriage on the property rights of the parties.**—Since by marriage the parties become at common law one person, and the wife's identity is merged in that of her husband,<sup>1</sup> he naturally stands in her place, and while he is husband has possession and control of all property which would otherwise have come into her possession and control;<sup>2</sup> but she has during coverture no estate in his property.<sup>3</sup> So that all the profits of the lands they occupied,<sup>4</sup> or of the money or chattels they got into their possession, belonged to the husband.<sup>5</sup> But courts of equity very soon recognized her separate existence,<sup>6</sup> and preserved for her sole and separate use all property settled upon her for this purpose,<sup>7</sup> and statutes have now been passed almost elsewhere, destroying wholly or partially the husband's rights over his wife's property during coverture.<sup>8</sup>

1 *Ante*, § 38.

2 *Post*, §§ 141-183.

3 *Post*, §§ 140, 244-301.

4 *Post*, §§ 141-162.

5 *Post*, §§ 163-183.

6 *Ante*, §§ 8, 38, 42.

7 *Post*, EQUITABLE SEPARATE ESTATE, §§ 197-216.

8 *Post*, STATUTORY SEPARATE ESTATE, §§ 217-263.

§ 138. **Effect of death or divorce on estates of husband and wife.**—The effects of the death of husband or wife on marriage estates or property rights are stated in Stewart on "Marriage and Divorce,"<sup>1</sup> as are those of the various forms of divorce,<sup>2</sup> and they will therefore be referred to herein but incidentally. Dower and curtesy, however, although they vest only on the death of husband and wife respectively, will be fully discussed.

1 Stewart M. & D. §§ 452-475.

2 Stewart M. & D. §§ 427-451.

§ 139. **Estates of husband and wife divided and enumerated.**—The estates of husband and wife are divided into those (1) of the husband in his own property, (2) in his wife's realty, including curtesy; (3) in his wife's personalty; (4) of the wife in her own property, including her equity to a settlement, and her separate equitable and separate statutory estates; (5) in her husband's realty, including dower; (6) in her husband's personalty; (7) and of both husband and wife in their joint and common estates, including jointure, community, entireties, and homestead.

## CHAPTER VIII.

## HUSBAND'S ESTATE IN HIS OWN PROPERTY

§ 140. A husband's estate, how limited by marriage.

§ 140. A husband's estate, how limited by marriage. — A man holds his property after marriage substantially as before ;<sup>1</sup> during his life no present estate arises in it for his wife,<sup>2</sup> but on his death she has dower or other share of his realty,<sup>3</sup> and thirds or other share of his personalty,<sup>4</sup> which estates or shares of hers he cannot defeat by deed or will.<sup>5</sup> He, however, is under certain disabilities as respects his conveyances to her ;<sup>6</sup> and she is a *quasi* creditor of his for her support,<sup>7</sup> and may defeat his conveyances made with intent to defeat her rights ;<sup>8</sup> so in Alabama by statute, if he is wasting his estate she may have a trustee appointed to take charge of it,<sup>9</sup> and may recover money lost by her in gambling.<sup>10</sup>

1 *Sims v. Ricketts*, 35 Ind. 181.

2 *Post*, WIFE'S ESTATES IN HUSBAND'S PROPERTY, §§ 244-301.

3 *Stewart M. & D.* § 461 ; *post*, §§ 244-300.

4 *Stewart M. & D.* § 462 ; *post*, § 301.

5 *Post*, §§ 268, 301 ; *Stewart M. & D.* §§ 461, 462.

6 *Ante*, §§ 40, *et seq.* ; 99 *et seq.*

7 *Ante*, §§ 64, 74 ; *Stewart M. & D.* §§ 381, 473.

8 *Stewart M. & D.* § 381.

9 Ala. R. C. 1876, §§ 2723-2727.

10 Ala. R. C. 1876. § 2132.

## CHAPTER IX.

### HUSBAND'S ESTATES IN WIFE'S REALTY

ART. I. IN GENERAL, §§ 141-145.

II. ESTATE DURING COVERTURE JURE UXORIS,  
§§ 146-150.

III. CURTESY, §§ 151-162.

ART. I. HUSBAND'S ESTATES IN WIFE'S REALTY, IN  
GENERAL.

§ 141. Under common law, settlements, and statutes.

§ 142. During coverture, and after death or divorce.

§ 143. In wife's estates of inheritance.

§ 144. In wife's life estates.

§ 145. In wife's chattels real.

§ 141. Estates under common law, settlements, and statutes.—In determining the nature of the estate of a husband in his wife's realty it is first necessary to ascertain whether the realty in question is held as at common law, under a settlement, or by virtue of a statute.

§ 142. Estates during coverture, and after death or divorce.—In determining the nature of the estate of a husband in his wife's realty it is necessary to ascertain whether coverture exists, or whether it has been dissolved by death<sup>2</sup> or divorce.<sup>3</sup>

1 It is not possible to absolutely separate estates during coverture, and estates after dissolution: See Stewart M. & D. § 452, n.

2 Stewart M. & D. §§ 452-475.

3 Stewart M. & D. §§ 427-451.

§ 143. Husband's estates in his wife's estates of inheritance.—At common law a husband has during coverture a freehold jointly with his wife in her estates of



inheritance<sup>1</sup> with absolute ownership of the rents and profits,<sup>2</sup> and if he survived her he might have a life estate therein called curtesy.<sup>3</sup> This estate during coverture *jure uxoris*<sup>4</sup> and curtesy are separately fully discussed.<sup>5</sup>

1 Barber v. Root, 10 Mass. 260, 263.

2 Shaw v. Partridge, 17 Vt. 626, 631.

3 Watson, 13 Conn. 83, 86.

4 Post, §§ 146-150.

5 Post, §§ 151-162.

§ 144. **Husband's estate in wife's life estates.**—In his wife's life estates—as, for example, her dower in the lands of a former husband<sup>1</sup>—a husband has, at common law, practically the same estate during coverture as he has in her estates of inheritance.<sup>2</sup> If her estate were for her life it terminated on her death, and he had nothing but emblements;<sup>3</sup> if her estate were for the life of some one else, he took, probably,<sup>4</sup> as special occupant;<sup>5</sup> but in no case could he have curtesy.<sup>6</sup> If before marriage she had demised her life estate for the term of her life, her interest is simply a *chose in action*.<sup>7</sup>

1 Doe v. Brown, 5 Blackf. 309, 310; Van Note v. Downey, 28 N. J. L. 219, 220, 223; Mann, 50 Pa. St. 375, 381; Cheney v. Pierce, 38 Vt. 515, 523; Ellsworth v. Hinds, 5 Wis. 613, 626. As to her estate of dower, see post, §§ 244-300.

2 Barber v. Root, 10 Mass. 260, 263; Gray v. Mathias, 7 Jones (N. C.) 502, 504; ante, § ; post, §§ .

3 Bennett, 34 Ala. 53; Spencer v. Lewis, 1 Houst. 223.

4 See 1 Bish. M. W. § 532, n. .

5 2 Kent Com. 134; 1 Bright. H. & W. 112, 113; Schoul. H. & W. § 417.

6 Stead v. Platt, 18 Beav. 50, 57; Gray v. Mathias, 7 Jones (N. C.) 502, 504; post, § 157.

7 Daniels v. Richardson, 22 Pick. 565, 570.

§ 145. **Husband's estate in wife's chattels real.**—In his wife's chattels real—as, for example, lands leased to her before<sup>1</sup> or after<sup>2</sup> marriage for a term of years—the husband has an almost absolute estate at common law.<sup>3</sup>

He may sell,<sup>4</sup> mortgage,<sup>5</sup> or otherwise dispose of them during his life,<sup>6</sup> and they are liable for his debts,<sup>7</sup> but he cannot dispose of them by will.<sup>8</sup> If he survive his wife his ownership is as absolute,<sup>9</sup> as his ownership of her personalty in possession.<sup>10</sup> But if she survives and has not appropriated them to his separate use or disposed of them,<sup>11</sup> and his creditors have not had them sold for his debts,<sup>12</sup> she takes them absolutely,<sup>13</sup> much as she does her *choses in action* not reduced to possession during coverture.<sup>14</sup> His disposition may be by any act to take effect in interest during his life,<sup>15</sup> such as an under lease to commence after his death;<sup>16</sup> if he assigns only a part, the remainder will survive to his wife.<sup>17</sup> He may dispose of her contingent interest in a term,<sup>18</sup> provided the contingency be one which could possibly happen during coverture.<sup>19</sup> He may forfeit the term,<sup>20</sup> or dissever her joint tenancy.<sup>21</sup> The same rule applies to equitable chattels real,<sup>22</sup> and he takes all chattels real subject to the equities against her.<sup>23</sup> Still his rights in her chattels real may be excluded by a settlement of them to her sole and separate use,<sup>24</sup> or by a separate property act.<sup>25</sup>

1 See 2 Blackst. Com. 386; 1 Bish. M. W. § 184, cases *infra*.

2 Baxter v. Smith, 6 Binn. 427, 429.

3 Bell H. & W. 102-110; quoted in full in 1 Bish. M. W. §§ 184-204; cases *infra*.

4 Meriwether v. Broker, 5 Litt. 254; Allen v. Hooper, 50 Me. 371, 374; Turn. & R. 180; Bates v. Dandy, 2 Atk. 207.

5 Allen v. Hooper, 50 Me. 371, 374. See Clark v. Burgh, 9 Jur. 679; Pitt.

6 Coke Litt. 46 b, 351 a; Roberts v. Polgrean, 1 Black. H. 535.

7 Allen v. Hooper, 50 Me. 371, 374. See Mitford, 9 Ves. 98; Coke Litt. 351 a.

8 Roberts v. Polgrean, 1 Black. H. 535.

9 Young v. Radford, Hob. 3; Mason v. Morgan, 2 Ad. & E. 30; Stewart M. & D. § 463.

10 Post, §§ 166-170.

11 Roberts v. Polgrean, 1 Black. H. 535; Young v. Radford, Hob. 3; Riley, 19 N. J. Eq. 229.

- 12 1 Bish. M. W. § 204 ; quoting Bell H. & W. 102-110.
- 13 See Turner, 1 Vern. 7 ; Pitt v. Hunt, 1 Vern. 18 ; Coke Litt. 46 b. 300 a, 351 a ; 1 Rob. Abridg. 345 ; Stewart M. & D. § 460.
- 14 Post, §§ 171-176.
- 15 1 Bish. M. W. § 192, quoting Bell H. & W. §§ 102-110.
- 16 Theobald v. Duffay, 9 Mod. 102.
- 17 Sym. Cro. Eliz. 33 ; 1 Rob. Abridg. 344 ; Moor. 395.
- 18 See Shaw v. Stewart, 1 Ad. & E. 300 ; Theobald v. Duffay, 9 Mod. 102 ; Chandos v. Talbot, 2 P. Wms. 603.
- 19 Duberly v. Day, 16 Beav. 33, 43 ; 5 H. L. Cas. 388.
- 20 Plow. 261 ; Coke Litt. 351 a.
- 21 Coke Litt. 185 b ; Plow. 413.
- 22 Tudor v. Samyne, 4 Mylne & C. 330 ; Pitt, Turn. & R. 180 ; Jackson v. Parker, Amb. 687 ; Clark v. Burgh, 2 Colly. C. C. 221.
- 23 Rawle v. Chichester, Amb. 719 ; Mitford, 1 Ves. 98 ; Moody v. Matthews, 7 Ves. 183 ; Winslow v. Tighe, 2 Brod. & B. 204 ; Stubbs v. Roth, 2 Brod. & B. 553.
- 24 Tullet v. Armstrong, 4 Mylne & C. 335 ; Turner, 1 Vern. 7 ; Draper, 2 Freem. 29, Tudor v. Samyne, 2 Vern. 270 ; post, §§ 197-216.
- 25 Post, §§ 217-243.

## ART. II.—HUSBAND'S ESTATE DURING COVERTURE JURE UXORIS.

- § 146. Husband's estate during coverture defined.
- § 147. Incidents of the estate.
- § 148. Wife's estates which are subject to this estate.
- § 149. Effect of settlements on this estate.
- § 150. Effect of statutes on this estate.

§ 146. **Husband's estate during coverture in his wife's lands defined.**—At common law a husband holds during coverture<sup>1</sup> in right of his wife,<sup>2</sup> she being merged in him,<sup>3</sup> all<sup>4</sup> her lands in possession,<sup>5</sup> and owns the rents and profits thereof absolutely.<sup>6</sup> This is called his freehold estate *jure uxoris*;<sup>7</sup> it is often said to be an estate for the joint lives of the husband and wife,<sup>8</sup> but this is a mistake as it terminates with absolute divorce.<sup>9</sup> It differs from curtesy initiate in that it is a vested<sup>10</sup> estate in possession,<sup>11</sup> while curtesy initiate is a contingent<sup>12</sup> future estate,<sup>13</sup> it is independent of birth of

issue,<sup>14</sup> is held in right of the wife,<sup>15</sup> and is not added to or diminished when curtesy initiate arises.<sup>16</sup>

1 Wright, 2 Md. 429, 453, 454; Rice v. Hoffman, 35 Md. 344, 349, 350; Barber v. Root, 10 Mass. 260, 263; *infra*, n. 9.

2 Wright, 2 Md. 429, 453; Porter v. Bowers, 55 Md. 213, 215.

2 Lancaster v. Stouffer, 10 Pa. St. 398, 399; *ante*, § 23.

4 *Post*, § 148.

5 See Baker v. Flournoy, 58 Ala. 650; Osborne v. Edwards, 11 N. J. Eq. 73; Gentry v. Wagstaff, 3 Dev. 270; cases *infra*, n. 7.

6 Harcourt v. Wyman, 3 Ex. 817; Beaver v. Lane, 2 Mod. 217; Nunn v. Givhan, 45 Ala. 370, 376; Chancey v. Strong, 2 Root, 369; Haralson v. Bridges, 14 Ill. 37, 38; Bailey v. Duncan, 4 Mon. 260; Edrington v. Harper, 3 Marsh. J. J. 360; Babb v. Perley, 1 Me. 6, 8; Clapp v. Stoughton, 10 Pick. 463; Barber v. Root, 10 Mass. 260, 263; Burleigh v. Coffin, 22 N. H. 118, 128; Van Note v. Downey, 28 N. J. L. 219, 223; Decker v. Livingston, 15 Johns. 479, 482; Lucas v. Rickerich, 1 Lea, 726, 728; Dold v. Geiger, 2 Gratt. 98, 116; Shaw v. Partridge, 17 Vt. 626, 631; *post*, § 147.

7 See Clifton, 5 Coke, 75; Kingham v. Lee, 15 Sim. 396; Polyblank v. Hawkins, 1 Doug. 329; Harcourt v. Wyman, 3 Ex. 817; Robertson v. Norris, 11 Q. B. 916; Elliott v. Teal, 5 Sawy. 249, 252; Cheek v. Waldrum, 25 Ala. 152; Bishop v. Blair, 36 Ala. 80; Pharis v. Leachman, 20 Ala. 662; Nunn v. Givhan, 45 Ala. 370, 376; Eaton v. Whitaker, 18 Conn. 222; Chancey v. Strong, 2 Root, 369; Royston, 21 Ga. 161; Kibbey v. Williams, 58 Ill. 20, 31; Haralson v. Bridges, 14 Ill. 37, 38; Butterfield v. Beall, 3 Ind. 203, 206; Junction v. Harris, 9 Ind. 184; Montgomery v. Tate, 12 Ind. 615; Gregory v. Ford, 5 Mon. B. 471; Allen v. Hooper, 50 Me. 371, 373; Beale v. Knowles, 45 Me. 479; Moore v. Richardson, 37 Me. 438; Trask v. Patterson, 29 Me. 499; Austin v. Stevens, 24 Me. 520; Porter v. Bowers, 55 Md. 213, 215; Rice v. Hoffman, 35 Md. 344, 349; Mutual v. Deal, 18 Md. 26, 47; Wright, 2 Md. 429, 453; Barber v. Root, 10 Mass. 260, 263; Melvin v. Proprietors, 16 Pick. 161, 165; Clapp v. Stoughton, 10 Pick. 463; Croft v. Wilbar, 7 Allen, 248; Baynton v. Finnall, 12 Miss. 193; Gonsolis v. Donchouquette, 1 Mo. 666; Schneider v. Stahr, 20 Mo. 269; Burleigh v. Coffin, 22 N. H. 118, 125; Nicholls v. O'Neill, 10 N. J. Eq. 88, 90; Den v. Quinby, 3 N. J. L. 985; Van Note v. Downey, 28 N. J. L. 219, 223; Jackson v. Caines, 20 Johns. 301; Decker v. Livingston, 15 Johns. 479, 482; Shallenberger, 25 Pa. St. 152; Lancaster v. Stouffer, 10 Pa. St. 398, 399; Starke v. Harrison, 5 Rich. 7; Coleman v. Satterfield, 2 Head, 259; Guion v. Anderson, 8 Humph. 298, 335; Dold v. Geiger, 2 Gratt. 98, 116; Degarnette v. Allen, 5 Gratt. 499, 511; Evans v. Kingberry, 2 Rand. 120, 131; Shaw v. Partridge, 17 Vt. 626, 631; Stroebe v. Fehl, 22 Wis. 337, 342.

8 Rice v. Hoffman, 35 Md. 344, 349; cases *supra*, n. 7.

9 Wright, 2 Md. 429, 455; Barber v. Root, 10 Mass. 260, 263; Stewart M. & D. § 413.

10 Van Note v. Downey, 28 N. J. L. 219, 222; Mann, 50 Pa. St. 375, 381; *ante*, § 22.

11 *Post*, § 147.

12 Porter, 27 Gratt. 599, 606; *post*, § 162; *ante*, § 22.

13 *Post*, § 158.

14 Wright, 2 Md. 429, 454; *supra*, n. 7.

15 Elliott v. Teal, 5 Sawy. 249, 252; *post*, § 147.

<sup>16</sup> *Kibbey v. Williams*, 58 Ill. 30, 31; *Winne*, 2 Lans. 21, 24; *post*, § 158.

§ 147. *Incidents of husband's estate during coverture jure uxoris.*—The husband is seized during coverture in the lands of his wife jointly with her,<sup>1</sup> he cannot aver that he alone is seized in her right,<sup>2</sup> so that while he can sue alone for severed personalty,<sup>3</sup> or for rents and profits,<sup>4</sup> he must join her in an ejectment suit for the lands,<sup>5</sup> or in any suit depending on seisin.<sup>6</sup> The rents and profits accruing during coverture are his absolutely;<sup>7</sup> he may sue for them alone;<sup>8</sup> and arrears belong to his representatives on his death,<sup>9</sup> not to her.<sup>10</sup> But subject to his beneficial enjoyment during coverture the ownership remains in her,<sup>11</sup> and on dissolution of the marriage goes to her or her heirs discharged entirely of his estate.<sup>12</sup> He can alone convey his estate,<sup>13</sup> but his conveyance carries only his interest,<sup>14</sup> and limitations begin to run against her estate as soon as the marriage is dissolved.<sup>15</sup> He may lease it,<sup>16</sup> while a lease by her is worthless,<sup>17</sup> but the lease ends with the coverture<sup>18</sup> (though his tenant may have emblements<sup>19</sup>), and thereafter is not binding on her, even though she has joined in it,<sup>20</sup> unless she is a party and has ratified it;<sup>21</sup> whether statute 32, Hen. VIII., ch. 28, is in force in the United States seems doubtful.<sup>22</sup> It is liable for his debts,<sup>23</sup> but only his usufructuary interest during coverture.<sup>24</sup> He has a right to reasonable estovers.<sup>25</sup> Though he has no right to commit waste,<sup>26</sup> as his wife has no remedy against him,<sup>27</sup> this right has been alleged;<sup>28</sup> but it is well settled that his assignee may be sued for waste.<sup>29</sup> On his wife's death his estate ceases, and he has no right to compensation for improvements,<sup>30</sup> but he has a right to emblements.<sup>31</sup> He may be barred by limitations;<sup>32</sup> but not of course by any act of the wife during coverture.<sup>33</sup>

- 1 Moore v. Vinter, 12 Sim. 161, 164; Frosdick v. Sterling, 2 Mod. 269, 270; Clanvickard v. Sidney, Hob. 1, 2; Weller v. Baker, 2 Wils. 414, 423, 424; Melvin v. Proprietors, 16 Pick. 161, 165, 166; Nicholls v. O'Neill, 10 N. J. Eq. 88, 90; Battle v. Mitchell, 7 Watts, 113, 115; Guion v. Anderson, 8 Humph. 298, 325; Weisinger v. Murphy, 2 Head, 674; Stroebe v. Fehl, 22 Wis. 337, 342.
- 2 Melvin v. Proprietors, 16 Pick. 161, 165; Stroebe v. Fehl, 22 Wis. 337, 342.
- 3 Fairchild v. Chaustelleux, 8 Watts, 412, 413; *post*,
- 4 Decker v. Livingston, 15 Johns. 479, 482; Dold v. Geiger, 2 Gratt. 98, 116.
- 5 Weller v. Baker, 2 Wils. 414, 423, 424; Battle v. Mitchell, 7 Watts, 113, 115.
- 6 Wyatt v. Simpson, 8 W. Va. 394.
- 7 Lucas v. Rickerich, 1 Lea, 726, 728; *ante*, 2 146, n. 6
- 8 *Supra*, n. 4.
- 9 See cases *ante*, 2 146, n. 6.
- 10 Shaw v. Partridge, 17 Vt. 626, 631.
- 11 *Infra*, notes 12, 14, 15, 18.
- 12 Stroebe v. Fehl, 22 Wis. 337, 340. See Rogers v. Brooks, 30 Ark. 612; Junction v. Harris, 9 Ind. 184; Clarke, 79 Pa. St. 376; cases *ante*, 2 142, n. 7.
- 13 Allen v. Hooper, 50 Me. 371, 373. See Butterfield v. Beall, 3 Ind. 203, 206; Trask v. Patterson, 29 Me. 499; Nicholls v. O'Neill, 10 N. J. Eq. 88, 90.
- 14 Evans v. Kingberry, 2 Rand. 120, 131.
- 15 Miller, 1 Meigs, 484.
- 16 Harcourt v. Wyman, 3 Ex. 817; Eaton v. Whitaker, 18 Conn. 222.
- 17 Allen v. Hooper, 50 Me. 371, 373; Murray v. Emmons, 19 N. H. 483, 486; Ross v. Adams, 28 N. J. L. 160, 162, 163.
- 18 Jackson v. Holloway, 7 Johns. 81, 85, 86.
- 19 Rowney, 2 Vern. 322; Gould v. Webster, 1 Vt. 409.
- 20 George v. Goldsby, 23 Ala. 326.
- 21 Toler v. Slater, Law R. 3 Q. B. 42, 45, 46.
- 22 Alex. Brit. Stats. pp. 321-326; 1 Bish. M. W. §§ 550-565.
- 23 Nicholls v. O'Neill, 10 N. J. Eq. 88, 90. See Cheek v. Waldrum, 25 Ala. 152; Montgomery v. Tate, 12 Ind. 615; Williams v. Morgan, 1 Litt. 168; Beele v. Knowles, 45 Me. 479; Sale v. Saunders, 24 Miss. 24; Schneider v. Stahlr, 20 Mo. 269; Brown v. Gale, 5 N. H. 416; Perkins v. Cottrell, 15 Barb. 446; Canby v. Porter, 12 Ohio, 79; Mitchell v. Sevier, 9 Humph. 146.
- 24 Litchfield v. Cadworth, 15 Pick. 23.
- 25 Armstrong v. Wilson, 60 Ill. 226, 228.
- 26 Stroebe v. Fehl, 22 Wis. 337, 343.
- 27 Babb v. Perley, 1 Me. 6, 9; Davis v. Gilliam, 5 Ired. Eq. 308, 309.
- 28 Clifton, 6 Coke, 175; Ware, 6 N. J. Eq. 117, 121; Degarnette v. Allen, 5 Gratt. 499, 514.
- 29 Babb v. Perley, 1 Me. 6, 10; Davis v. Gilliam, 5 Ired. Eq. 308, 309; Degarnette v. Allen, 5 Gratt. 499, 514.

30 Washburn v. Sprout, 16 Mass. 449 ; Runey v. Edwards, 15 Mass. 291 ; Burleigh v. Coffin, 22 N. H. 118, 125, 126 ; Marable v. Jordan, 5 Humph. 417, 418 ; *ante*, § 131 ; Stewart M. & D. §§ 460, 473.

31 Bennett, 34 Ala. 53, 55.

32 Kibbey v. Williams, 53 Ill. 30, 31. Compare *post*, § 159, n. 18.

33 Den v. Quinby, 3 N. J. L. 985.

§ 148. What estates of wife are subject to this estate.— This estate in right of his wife arises in favor of the husband in all her common-law estates in possession ;<sup>1</sup> he has a joint seisin<sup>2</sup> with her in all estates of which she is seized,<sup>3</sup> whether of inheritance or for life,<sup>4</sup> and whether several or joint.<sup>5</sup> But her equitable separate and statutory separate estates are usually not in any way in the possession or control of her husband during coverture.<sup>6</sup>

1 Not in remainder : Gentry v. Wagstaff, 3 Dev. 270 ; 1 Bish. M. W. § 505, n.

2 *Ante*, § 147, n. 1.

3 Compare *post*, § 155.

4 Barber v. Root, 10 Mass. 260, 263 ; Van Note v. Downey, 28 N. J. L. 219, 223 ; *ante*, § 144.

5 Bishop v. Blair, 36 Ala. 80 ; Royston, 21 Ga. 161.

6 *Post*, §§ 149, 150.

§ 149. Effect of settlements on the husband's estate during coverture.—The chief object of a settlement to the sole and separate use of a married woman is to exclude the rights of her husband during coverture,<sup>1</sup> and all such settlements do prevent his estate *jure uxoris* from arising,<sup>2</sup> although they may leave his rights after her death unaffected.<sup>3</sup>

1 Cooney v. Woodburn, 33 Md. 320, 326 ; *post*, § 157.

2 *Post*, EQUITABLE SEPARATE ESTATE, §§ 197-216.

3 See *post*, § 157.

§ 150. Effect of statutes on the husband's estate during coverture.—The chief purpose of the separate property acts passed in all States where the common law once prevailed was to free the property of wives from the

marital rights of their husbands, and this estate *jure uxoris* is now almost universally abolished.<sup>1</sup> Generally, the wife is enabled to hold her property alone, free from the husband and his creditors,<sup>2</sup> though in Alabama he is made trustee of her property subject to removal for unfitness.<sup>3</sup> The estate is, however, a vested one,<sup>4</sup> and cannot be destroyed by statute.<sup>5</sup>

1 *Post*, §§ 233, 243.

2 *Post*, STATUTORY SEPARATE ESTATE, §§ 217-243.

3 Ala. Code 1876, § 2706; *Dent v. Slough*, 40 Ala. 518, 523; *Bishop v. Blair*, 36 Ala. 80.

4 *Van Note v. Downey*, 8 N. J. L. 219, 222; *Mann*, 50 Pa. St. 375, 381.

5 *Ante*, § 22.

### ARTICLE III.—CURTESY.

- § 151. Definitions of curtesy.
- § 152. Common-law requisites of curtesy.
- § 153. Marriage necessary to give curtesy.
- § 154. Birth of issue necessary to give curtesy.
- § 155. Seisin of wife necessary to give curtesy.
- § 156. Death of wife necessary to give curtesy.
- § 157. Property in which curtesy exists.
- § 158. Incidents of estate of curtesy.
- § 159. Barring and defeating of curtesy.
- § 160. Curtesy under statutes, generally.
- § 161. Effect of married women acts on curtesy.
- § 162. Retrospective effect of statutes.

§ 151. **Definitions of curtesy.**—At common law curtesy is the estate of a husband<sup>1</sup> which arises out of such of his wife's estates of inheritance<sup>2</sup> as she is seized of in fact<sup>3</sup> during coverture,<sup>4</sup> if a child of theirs who could inherit such estates<sup>5</sup> is born alive before her death.<sup>7</sup> After marriage, seisin, and birth of such child, the estate is *initiate*<sup>8</sup> or contingent on the death of the wife;<sup>9</sup> after such death it is *consummate*<sup>10</sup>—a freehold estate for the life of the husband<sup>11</sup> with the incidents of a conventional life estate.<sup>12</sup> Under statutes curtesy may differ from curtesy at common law in one or more



respects.<sup>13</sup> Littleton's definition is: "Where a man taketh a wife seized in fee simple, or in fee tail general, or seized as heir in tail especial, and hath issue by the same wife, male or female, born alive, albeit the issue after liveth or dieth, yet if the wife dies the husband shall hold the land during his life."<sup>14</sup> Bishop's is: "Tenancy by the curtesy arises where, after a marriage not void in law, and if voidable not actually annulled by judicial sentence, there is issue of the marriage born alive; then if the husband survives the wife, he holds for his life the real estate which was hers in actual possession at any time during the coverture, and which also could be inherited by the child if living as tenant by the curtesy consummate; while after the birth of the child and before the death of the mother he sustains a somewhat similar relation to it, known as tenancy by the curtesy initiate."<sup>15</sup> Other definitions are referred to in a note.<sup>16</sup>

1 *Heath v. White*, 5 Conn. 228, 235. Must be valid marriage to render him "husband": *Post*, § 153.

2 *Rawlings v. Adams*, 7 Md. 26, 54; *Stead v. Platt*, 18 Beav. 50; *post*, § 157.

3 *Carpenter*, 75 Va. 120, 134; *post*, § 155.

4 *McDaniel v. Grace*, 15 Ark. 465, 483; *post*, § 155.

5 *Coke Litt.* 40 a; *post*, § 154.

6 *Heath v. White*, 5 Conn. 228, 236; *post*, § 154.

7 *Marsellis v. Thalheimer* 2 Paige, 42.

8 *Rice v. Hoffman*, 35 Md. 344, 350; *post*, § 158.

9 *Porter*, 27 Gratt. 599, 606; *post*, § 156.

10 *Wheeler v. Hotchkiss*, 10 Conn. 225, 230; *post*, § 158.

11 *Foster v. Marshall*, 22 N. H. 431, 493; *post*, § 158.

12 *Rice v. Hoffman*, 35 Md. 344, 349, 350; *post*, § 158.

13 *Post*, § 160.

14 *Litt.* § 35.

15 1 Bish. M. W. § 473.

16 1 Greenl. Cruise, 133, 140; 2 Blackst. Com. 126, 127; 4 Kent Com. 27, 28; Boone Real Prop. § 44; 1 Wash. Real Prop. 148, 149; Orr v. Hollidays, 9 Mon. B. 59; Day v. Cochran, 24 Miss. 261, 274; Fergusson v. Tweedy, 56 Barb. 168, 172, 173; Billings v. Baker, 28 Barb. 345; statutes cited *post*, § 160.

§ 152. Common law requisites of curtesy. — At common law there are said to be four requisites of curtesy: <sup>1</sup> (1) marriage; <sup>2</sup> (2) birth of issue capable of inheriting; <sup>3</sup> (3) seisin of the wife during coverture; <sup>4</sup> (4) death of the wife. <sup>5</sup> These requisites need not all exist at the same time. <sup>6</sup> Thus, birth of issue before the marriage is sufficient, if the issue is legitimated by the marriage. <sup>7</sup> So seisin during coverture is sufficient though disseisin occurs before birth of issue. <sup>8</sup> So birth of issue is sufficient, though such issue dies before seisin. <sup>9</sup> And curtesy *initiate* exists before the death of the wife. <sup>10</sup> It is not proper to say that curtesy initiate arises on the birth of issue, <sup>11</sup> for it really arises on birth of issue or seisin which ever first takes place. <sup>12</sup> The marriage must exist when the wife dies, <sup>13</sup> for an absolute divorce destroys curtesy. <sup>14</sup> Another requisite is that the husband be capable of holding real estate, <sup>15</sup> not, for example, an alien. <sup>16</sup>

1 Menvil, 13 Coke, 19, 23; Hunter v. Whitworth, 9 Ala. 965, 967; McDaniel v. Grace, 15 Ark. 465, 483; Wheeler v. Hotchkiss, 10 Conn. 225, 230; Stewart v. Ross, 50 Miss. 776, 788; Jackson v. Johnson, 5 Cowen, 74, 95; 15 Am. Dec. 433; Furguson v. Tweedy, 43 N. Y. 543; 56 Barb. 168; Carpenter v. Garrett, 75 Va. 129, 133; Winkler, 18 W. Va. 455, 457. See DEFINITIONS, *ante*, § 151.

2 *Post*, § 153.

3 Comer v. Chamberlain, 6 Allen, 166, 169; *post*, § 154.

4 McDaniel v. Grace, 15 Ark. 465, 483; *post*, § 155.

5 Stewart M. & D. § 463; *post*, § 156.

6 See Menvil, 13 Coke, 19, 23; Hunter v. Whitworth, 9 Ala. 965, 969; Comer v. Chamberlain, 6 Allen, 166, 169; Jackson v. Johnson, 5 Cowen, 74, 95; Coke Litt. 30 a.

7 Hunter v. Whitworth, 9 Ala. 965, 969; *post*, § 153.

8 Comer v. Chamberlain, 6 Allen, 166, 169; *post*, § 155.

9 Jackson v. Johnson, 5 Cowen, 74, 95; 15 Am. Dec. 433; *post*, § 154.

10 Stewart v. Ross, 50 Miss. 776, 789; *post*, §§ 156, 153.

11 *Ante*, § 151; Bishop's definition.

12 Gibbins v. Eyden, Law R. 7 Eq. 371, 376.

13 *Post*, § 153.

14 Stewart M. & D. § 443; *post*, § 159.

15 1 Greenl. Cruise, 144; Boone Real Prop. § 49.

16 Hatfield v. Sneden, 54 N. Y. 280, 235. See Foss v. Crisp, 20 Pick. 121; Reese v. Waters, 4 Watts & S. 145.

§ 153. **Marriage necessary to give curtesy.**—A man has curtesy in a woman's lands only as her husband,<sup>1</sup> though in asserting his rights he may prove his marriage by cohabitation and repute.<sup>2</sup> The marriage between them must be valid,<sup>3</sup> this term including a voidable marriage not decreed void before the wife's death;<sup>4</sup> there is no curtesy if the marriage were void,<sup>5</sup> this term including a voidable marriage duly avoided.<sup>6</sup> The marriage may take place after the birth of issue if such issue is thereby legitimated.<sup>7</sup> But it must exist at the time of the wife's death, for a divorce *a vinculo* destroys curtesy.<sup>8</sup>

1 1 Cruise Dig. 107; 1 Wash. Real Prop. 130; Boone Real Prop. § 45; *ante*, § 151.

2 Stewart M. & D. §§ 129, 136.

3 See fully Stewart M. & D. §§ 45, *et seq.*

4 Stewart M. & D. § 51.

5 Stewart M. & D. § 50.

6 Stewart M. & D. § 147.

7 Hunter v. Whitworth, 9 Ala. 965, 969.

8 Stewart M. & D. § 443; *post*, § 153.

§ 154. **Birth of issue necessary to give curtesy.**—At common law there is no curtesy without birth of issue.<sup>1</sup> The issue must be born alive,<sup>2</sup> but if so born it makes no difference whether it lives an hour or to old age.<sup>3</sup> It must be born during the life of its mother;<sup>4</sup> a delivery by a Cæsarean operation after the mother's death is not sufficient.<sup>5</sup> It must be capable of becoming heir to the estate;<sup>6</sup> the birth of a girl would not give curtesy in an estate tail male.<sup>7</sup> It may be born after disseisin,<sup>8</sup> or die before seisin.<sup>9</sup> Its birth may be proved by its father.<sup>10</sup> Statutes in some States have done away with this requisite.<sup>11</sup>

1 Winkler, 13 W. Va. 455, 466. See Paine, 8 Coke, 34; Heath v. White, 5 Conn. 228, 236; Ryan v. Freeman, 36 Miss. 175; Day v. Cochran, 24 Miss. 261; Porch v. Fries, 4 N. J. Eq. 204; Marsellis v. Thalhimer, 2 Paige, 35, 42; *ante*, § 152.

2 Coke Litt. 30 *a*, 60 *b*; 2 Blackst. Com. 101; *supra*, n. 1.

3 Heath v. White, 5 Conn. 228, 236.

4 2 Blackst. Com. 127, 128; 1 Greenl. Cruise, 143; *supra*, n. 1.

5 Marsellis v. Thalhimer, 2 Paige, 35, 42.

6 Coke Litt. 40 *a*; Porch v. Fries, 4 N. J. Eq. 204; *supra*, n. 1.

7 Paine, 8 Coke, 34, 35 *b*; Coke Litt. 29 *b*.

8 Johnson v. Jackson, 5 Cowen, 74, 95; 15 Am. Dec. 433.

9 Comer v. Chamberlain, 6 Allen, 166, 169.

10 Jones v. Ricketts, 31 Law J. Ch. 753.

11 Dubs, 31 Pa. St. 154; *post*, § 160.

§ 155. The seisin of the wife necessary to give curtesy. — The word "seisin" applies only to freehold estates.<sup>1</sup> One who is in actual possession of real estate, claiming a freehold,<sup>2</sup> or one who though not in actual possession has the immediate right to possession by deed<sup>3</sup> or judicial judgment,<sup>4</sup> is *seized in fact*; one who has a mere right of possession in law, as an heir,<sup>5</sup> or in equity, as one who has a right to have a trust declared,<sup>6</sup> is seized in law or in equity. The wife's seisin to give curtesy must be, (1) *seisin in fact*; (2) it must be *beneficial*; (3) it must be *sole*; but (4) it may exist at any time during coverture.

1. *Seisin in fact* is necessary to give curtesy,<sup>7</sup> though this rule has been somewhat relaxed,<sup>8</sup> and is not applicable to wild lands.<sup>9</sup> Thus, personal possession,<sup>10</sup> or possession through one's agent,<sup>11</sup> trustee,<sup>12</sup> lessee,<sup>13</sup> or co-parcener,<sup>14</sup> or constructive possession given by deed,<sup>15</sup> or judgment in ejectment,<sup>16</sup> is sufficient seisin; but there is no curtesy in the estate of an heir before entry,<sup>17</sup> or of one who has to resort to law or equity to obtain possession,<sup>18</sup> as when it is held under claim of adverse title.<sup>19</sup> Nor can a husband have curtesy in his wife's remainders,<sup>20</sup> unless the intermediate estate determines, as when it vests in her and merges,<sup>21</sup> or the life

tenant dies,<sup>22</sup> during coverture; for otherwise there is no seisin in fact.<sup>23</sup>

2. The wife's seisin must be *beneficial*;<sup>24</sup> there is no curtesy in a wife's bare legal estate,<sup>25</sup> or if there is it is itself a bare legal estate.<sup>26</sup>

3. The wife's seisin must be *sole*; there is no curtesy of property in which she is joint tenant,<sup>27</sup> though there is when she is tenant in common,<sup>28</sup> or coparcener.<sup>29</sup>

4. The wife must be *seized during coverture*,<sup>30</sup> but not necessarily at the time of her death,<sup>31</sup> or of the birth of issue.<sup>32</sup> Thus, if after marriage a wife be seized and then be disseized and then have issue,<sup>33</sup> or if she have issue and the issue die and she be thereafter seized,<sup>34</sup> the husband has his curtesy.

1 Slater v. Rawson, 6 Met. 439, 444. See Fitzhugh v. Croghan, 2 Marsh. J. J. 421; 19 Am. Dec. 139; Towle v. Ayer, 8 N. H. 58; Englishbe v. Helmuth, 3 N. Y. 294; Boone Real Prop. § 20; Co. Litt. 153 a.

2 Vanderheyden v. Crandell, 2 Denio, 9, 21; 1 N. Y. 491. See Hovenden v. Annesley, 2 Schooles & L. 623; Mercer v. Selden, 1 How. 37, 54; Durando, 32 Barb. 529.

3 Mercer v. Selden, 1 How. 37, 54. See Higbee v. Rice, 5 Mass. 352; Adair v. Lott, 3 Hill, 182.

4 Ellsworth v. Cook, 8 Paige, 643.

5 Carpenter v. Garrett, 75 Va. 129, 135.

6 Sartill v. Robeson, 2 Jones Eq. 510, 512.

7 Carpenter v. Garrett, 75 Va. 129, 134. See Mercer v. Selden, 1 How. 37, 54; Bush v. Bradley, 4 Day, 298, 305; Adams v. Logan, 6 Mon. 179; Furguson v. Tweedy, 56 Barb. 168; 43 N. Y. 543, 548; Gibbs v. Esty, 22 Hun, 266.

8 Bush v. Bradley, 4 Day, 298, 305. See Kline v. Beebe, 6 Conn. 494; Wass v. Bucknam, 33 Me. 356; Day v. Cochran, 24 Miss. 261; Stephens v. Hume, 25 Mo. 349; Harvey v. Wickham, 23 Mo. 112; Reaume v. Chambers, 22 Mo. 36; McKee v. Cottle, 6 Mo. App. 416; Jackson v. Johnson, 5 Cowen, 74, 94; 15 Am. Dec. 433; Adair v. Lott, 3 Hill, 182; Merritt v. Horne, 5 Ohio St. 307; Borland v. Marshall, 2 Ohio St. 308; Mitchell v. Ryan, 3 Ohio St. 377; Buchanan v. Duncan, 40 Pa. St. 82; Chew v. Commissioners, 5 Rawle, 160; McCorry v. King, 3 Humph. 267.

9 Davis v. Mason, 1 Peters, 503, 506, 507; Mercer v. Selden, 1 How. 37, 54. See Barr v. Galloway, 1 McLean, 476; Wells v. Thompson, 13 Ala. 793; 48 Am. Dec. 76; Day v. Cochran, 24 Miss. 261, 377; Jackson v. Sellick, 8 Johns. 262. *Contra*, Neely v. Butler, 10 Mon. B. 48.

10 Mercer v. Selden, 1 How. 37, 54.

11 Carpenter v. Garrett, 75 Va. 129, 135.

12 Rawlings v. Adams, 7 Md. 23, 51; Lowry v. Steele, 4 Ohio, 170; *post*, § 157.

II. & W. — 20.

13 *Comer v. Chamberlain*, 6 Allen, 166, 167; *Jackson v. Johnson*, 5 Cowen, 74, 95. See *Powell v. Gossom*, 13 Mon. B. 179; *Ellsworth v. Cook*, 8 Paige, 643; *Taylor v. Gould*, 10 Barb. 388; *Carter v. Williams*, 8 Ired. Eq. 177; *Lowry v. Steele*, 4 Ohio, 170.

14 *Carr v. Givens*, 9 Bush, 679; 15 Am. Rep. 747. See *De Grey v. Richardson*, 3 Atk. 469; *Buckley*, 11 Barb. 43.

15 *Davis v. Mason*, 1 Peters, 503, 508; *Redus v. Hayden*, 43 Miss. 614; *Adair v. Lott*, 3 Hill, 182; *supra*, n. 3.

16 *Ellsworth v. Cook*, 8 Paige, 643.

17 *Carpenter v. Garrett*, 75 Va. 129, 135. See *Mercer v. Selden*, 1 How. 37, 55; *Phaelon v. Houseal*, 2 McCord Ch. 423.

18 *Sartill v. Robeson*, 2 Jones Eq. 510, 512.

19 *Parker v. Carter*, 4 Hare, 400. But see *Borland v. Marshall*, 2 Ohio St. 308; *supra*, n. 8.

20 *Doe v. Rivers*, 7 Term, 272; *Stoddard v. Gibbs*, 1 Sum. 263; *Planters v. Davis*, 31 Ala. 628; *Baker v. Flournoy*, 58 Ala. 650; *Mackey v. Proctor*, 12 Mon. B. 433; *Stewart v. Barclay*, 2 Bush, 550; *Shores v. Carley*, 8 Allen, 425; *Malone v. McLaurin*, 40 Miss. 161; *Redus v. Hayden*, 43 Miss. 614; *McKee v. Cottle*, 6 Mo. App. 416; *Oxford v. Benton*, 36 N. H. 395; *Ferguson v. Tweedy*, 43 N. Y. 543; *Taylor v. Gould*, 10 Barb. 388; *Watkins v. Thornton*, 11 Ohio St. 367; *Hitner v. Ege*, 23 Pa. St. 305; *Reed*, 3 Head, 491; *Upchurch v. Anderson*, 50 Tenn. 410.

21 *Taylor v. Gould*, 10 Barb. 388.

22 *McKee v. Cottle*, 6 Mo. App. 416; *Watkins v. Thornton*, 11 Ohio St. 367.

23 *Watkins v. Thornton*, 11 Ohio St. 367.

24 1 Perry Trusts, §§ 322-324.

25 *Hopkinson v. Dumas*, 42 N. H. 303; *Prescott v. Walker*, 16 N. H. 343; *Chew v. Commissioners*, 5 Rawle, 160.

26 *Taylor v. Smith*, 54 Miss. 50.

27 1 Wash. Real Prop. 135; Litt. § 45.

28 *Wash v. Bucknam*, 38 Me. 360.

29 *Carr v. Givens*, 9 Bush, 679, 683; 15 Am. Rep. 747; *supra*, n. 14.

30 *Mercer v. Selden*, 1 How. 37, 55; *McDaniel v. Grace*, 15 Ark. 465, 483; *Upchurch v. Anderson*, 50 Tenn. 410, 411; *supra*, n. 20.

31 Except by statute: *Stewart v. Ross*, 50 Miss. 776.

32 *Jackson v. Johnson*, 5 Cowen, 74, 95; *ante*, § 152.

33 *Comer v. Chamberlain*, 6 Allen, 166, 169; *ante*, §§ 152, 154, 155.

34 *Jackson v. Johnson*, 5 Cowen, 74, 95; *ante*, §§ 152, 154.

‡ 156. Death of wife necessary to give curtesy. — Until the death of the wife curtesy is initiate<sup>1</sup> — a contingent and not a vested estate;<sup>2</sup> only after it is consummated by the wife's death is the husband properly a tenant by the curtesy.<sup>3</sup> On her death he becomes so, without any assignment,<sup>4</sup> by operation of law,<sup>5</sup> and has a life

estate with the rights of a conventional life tenant.<sup>6</sup> Civil death is probably not sufficient,<sup>7</sup> though her conviction of bigamy may be, by statute.<sup>8</sup>

1 Rice v. Hoffman, 35 Md. 344, 350; *ante*, §§ 22, 151; *post*, § 153.

2 Porter, 27 Gratt. 599, 606; *ante*, § 22; *post*, § 162.

3 Jones v. Davies, 7 Hurl. & N. 507, 508; Wheeler v. Hotchkiss, 10 Conn. 225, 230; Wime, 2 Lans. 21, 24; *post*, § 153.

4 Rice v. Hoffman, 35 Md. 244, 250; Adair v. Lott, 3 Hill, 132.

5 Watson, 13 Conn. 83, 86.

6 Shortall v. Hinkley, 31 Ill. 219, 227; *post*, § 153.

7 Stewart M. & D. § 475.

8 Md. R. C. 1873, p. 807, § 102.

§ 157. Property in which curtesy exists.—Curtesy is an estate in real property,<sup>1</sup> though when money is treated in equity as realty a husband may have the interest thereof as curtesy.<sup>2</sup> It arises only out of estates of inheritance<sup>3</sup>—not, for example, out of an estate *per autre vie*<sup>4</sup>—and arises equally whether the fee is absolute or determinable.<sup>5</sup> But whether or not it continues after a determinable fee has determined is disputed,<sup>6</sup> and, strangely enough, the prevailing opinion is that it does.<sup>7</sup> The fee must be a present one, for no curtesy arises out of remainders;<sup>8</sup> and it must not be held by the wife as joint tenant.<sup>9</sup> Curtesy arises out of equitable as well as legal estates of inheritance,<sup>10</sup> if there is seisin in fact;<sup>11</sup> indeed, it does not arise out of bare legal estates.<sup>12</sup> But when property is settled on a married woman, and the settlement contains words clearly excluding the marriage rights of her husband,<sup>13</sup> it is her *equitable separate estate*,<sup>14</sup> and he has no curtesy in it;<sup>15</sup> still if the words do not also exclude his rights after her death, he will have curtesy if he survives her,<sup>16</sup> unless in pursuance of powers in the settlement she has conveyed the property away<sup>17</sup> or willed it.<sup>18</sup> And much the same rule applies to her *statutory separate estate*,<sup>19</sup> out of which curtesy may or may not

arise.<sup>20</sup> There is no curtesy in a wife's pre-emption rights in United States lands.<sup>21</sup>

1 2 Blackst. Com. 126 ; 1 Greenl. Cruise, 140.

2 Rice v. Hoffman, 35 Md. 344, 352. See Sweetapple v. Bindon, 2 Vern. 536 ; Fletcher v. Ashburner, 1 Brock. 409 ; Dodson v. Hay, 3 Brock. 404 ; Follett v. Tyrer, 14 Sim. 125 ; Davis v. Mason, 1 Peters, 503 ; Dunscomb, 1 Johns. Ch. 506 ; 7 Am. Dec. 504 ; Clipper v. Livergood, 5 Watts, 115 ; *ante*, § 136.

3 Sumner v. Partridge, 2 Atk. 47 ; Boothby v. Vernon, 9 Mod. 147 ; Simmons v. Gooding, 5 Fred. Eq. 382.

4 Stead v. Platt, 18 Beav. 50, 57.

5 Paine, 8 Coke, 67, 68 ; Thornton v. Krepps, 37 Pa. St. 391 ; Withers v. Jenkins, 14 S. C. 537.

6 Mason v. Johnson, 47 Md. 347, 357 ; Hatfield v. Sneden, 54 N. Y. 284.

7 Buckworth v. Thirkell, 3 Bos. & P. 652, n ; 4 Dong. 323 ; Moody v. King, 2 Bing. 447 ; 9 Eng. C. L. 475 ; Smith v. Spencer, 6 DeGex, M. & G. 632 ; Norricott v. Whipp, 12 Mon. B. 65 ; Hatfield v. Sneden, 54 N. Y. 280 ; Thornton v. Knapp, 37 Pa. St. 391 ; Evans, 9 Pa. St. 190 ; Taliaferro v. Burwell, 4 Call. 321 ; Withers v. Jenkins, 14 S. C. 597 ; 1 Wash. Real Prop. 135 ; 1 Greenl. Cruise, 146, 147 ; 4 Kent Com. 32 ; Boone Real Prop. § 50. But see Doe v. Hulton, 3 Bos. & P. 653 ; Weller, 28 Barb. 589.

8 Redus v. Hayden, 43 Miss. 614, 656 ; *ante*, § 155.

9 1 Wash. Real Prop. 135 ; *ante*, § 155.

10 Rawlings v. Adams, 7 Md. 26, 54. See Appleton v. Rawley, Law R. 8 Eq. 139, 143 ; Fletcher v. Ashburner, 1 Brown Ch. 503 ; Robinson v. Codman, 1 Sum. 128 ; Phillips v. Codman, 2 Duval, 549 ; Gardner v. Hooper, 3 Gray, 404 ; Houghton v. Hapgood, 13 Pick. 154 ; Robb v. Griffin, 26 Miss. 579 ; Taylor v. Smith, 54 Miss. 50 ; Alexander v. Worrance, 17 Mo. 228 ; Tremmell v. Kleiboldt, 6 Mo. App. 549 ; Cushing v. Blake, 29 N. J. Eq. 399 ; 30 N. J. Eq. 696 ; Sartill v. Robeson, 2 Jones Eq. 510, 512 ; Lowry v. Steele, 4 Ohio, 171 ; Dubs, 31 Pa. St. 154 ; Nightingale v. Hidden, 7 R. I. 115 ; Withers v. Jenkins, 14 S. C. 597 ; Baker v. Heiskell, 1 Cold. 641 ; Winkler, 18 W. Va. 455.

11 Sartill v. Robeson, 2 Jones Eq. 510, 512. See Parker v. Carter, 4 Hare, 413 ; Pitt v. Jackson, 2 Brown Ch. 51 ; Morgan, 5 Madd. 408 ; *ante*, § 155.

12 Chew v. Commissioners, 5 Kawle, 160, 163 ; *ante*, § 155.

13 Mitchell v. Moore, 16 Gratt. 275, 280. See Moore v. Webster, Law R. 3 Eq. 267 ; Morgan, 5 Madd. 408 ; Payne, 11 Mon. B. 138 ; Tremmell v. Kleiboldt, 6 Mo. App. 549 ; Douglas v. Cruger, 80 N. Y. 15 ; Dubs, 31 Pa. St. 149 ; Ege v. Medlar, 82 Pa. St. 86 ; Carter v. Dale, 3 Lea, 710 ; 31 Am. Rep. 600 ; *post*, § 200.

14 *Post*, §§ 196-217.

15 Hearle v. Greenbank, 1 Ves. Sr. 298 ; Moore v. Webster, Law R. 3 Eq. 267 ; Barker, 2 Sim. 249 ; Monroe v. Van Meter, 100 Ill. 347 ; Pool v. Blakie, 53 Ill. 415 ; Rigler v. Cloud, 14 Pa. St. 361 ; Stokes v. McKibbin, 13 Pa. St. 267 ; Cochran v. O'Hern, 4 Watts & S. 95 ; 39 Am. Dec. 69 ; Bottoms v. Carley, 5 Heisk. 6 ; Beecher v. Hicks, 7 Lea, 207 ; *infra*, n. 16.

16 Cooney v. Woodburn, 33 Md. 320, 326, 327 ; Winkler, 18 W. Va. 455, 466, 467. See Appleton v. Rawley, Law R. 8 Eq. 139, 143 ; Cooper



*v. McDonald*, Law R. 7 Ch. D. 238; 23 Eng. Rep. 581; *Follett v. Tyrer*, 14 Sim. 125; *Burnet v. Davis*, 2 P. Wms. 316; *Rochon v. Lecott*, 2 Stewt. 429; *De Hart v. Dean*, 2 McAr. 60; *Payne*, 11 Mon. B. 138; *Hart v. Soward* 14 Mon. B. 305; *Douglas v. Cruger*, 80 N. Y. 15; *Hatfield v. Sneden*, 54 N. Y. 280; *Hardy v. Van Harlingen*, 7 Ohio St. 208; *Lowry v. Steele*, 4 Ohio, 170; *Ege v. Medlar*, 82 Pa. St. 86; *Tillinghast v. Coggeshall*, 7 R. I. 383; *Frazer v. Hightower*, 12 Heisk. 94; *Carter v. Dale*, 3 La. 710; 21 Am. Rep. 660; *Sayer v. Wall*, 26 Gratt. 354; 21 Am. Rep. 303.

17 *Pool v. Blakie*, 53 Ill. 495, 502.

18 *Stokes v. McKibbin*, 13 Pa. St. 267, 269.

19 *Post*, ch. xiii., §§ 217-243.

20 *Post*, §§ 160-162.

21 *McDaniel v. Grace*, 15 Ark. 465, 484.

§ 153. *Incidents of the estate of curtesy.*—Curtesy has two stages: one in which it is initiate and contingent, the other in which it is consummate and vested.

1. *Curtesy initiate.* When marriage,<sup>1</sup> birth of issue,<sup>2</sup> and seisin<sup>3</sup> have taken place,<sup>4</sup> curtesy initiate exists.<sup>5</sup> Although the husband holds this estate in his own right,<sup>6</sup> and by the old common law had through it certain rights to homage, etc.,<sup>7</sup> he has by virtue of it no present tenancy,<sup>8</sup> it works no change in the incidents of his tenancy during coverture in his wife's right.<sup>9</sup> It is not a vested estate,<sup>10</sup> and may be destroyed by divorce<sup>11</sup> or by statute;<sup>12</sup> and though it arise in property in which the husband is tenant for years no merger follows.<sup>13</sup> Still the husband may convey his contingent interest,<sup>14</sup> it may be seized for his debts,<sup>15</sup> he cannot in fraud of creditors<sup>16</sup> settle it on his wife,<sup>17</sup> nor will a court of equity interfere with it on her behalf.<sup>18</sup> All the husband's rights during coverture are, however, suspended by settlements to the wife's sole and separate use,<sup>19</sup> and almost every where now by statutes.<sup>20</sup>

2. *Curtesy consummate.* Only on the wife's death does curtesy become *consummate* and vest,<sup>21</sup> and is the husband properly tenant by the curtesy.<sup>22</sup> He becomes so by operation of law,<sup>23</sup> no assignment being necessary,<sup>24</sup> and whether he so desires or not.<sup>25</sup> He takes

rather as an heir than as a purchaser,<sup>26</sup> and holds the property subject to all encumbrances.<sup>27</sup> His estate has the incidents of a conventional life estate;<sup>28</sup> he may eject others therefrom,<sup>29</sup> and defend an ejectment suit brought against him by his wife's heirs.<sup>30</sup> He may sell<sup>31</sup> or lease<sup>32</sup> it, but only his interest;<sup>33</sup> an attempt to convey the fee, under the old law working a forfeiture against him;<sup>34</sup> and it may be taken for his debts.<sup>35</sup> He has a right to reasonable estovers,<sup>36</sup> but not to commit waste.<sup>37</sup>

1 *Ante*, § 153.

2 *Ante*, § 154.

3 *Ante*, § 155.

4 As shown, *ante*, § 152.

5 *Rice v. Hoffman*, 35 Md. 341, 350; *Foster v. Marshall*, 22 N. H. 491, 493; *Winne*, 2 Lans. 21, 24; *Wilson v. Arentz*, 70 N. C. 670, 673; *ante*, §§ 151, 152, 156.

6 *Heath v. White*, 5 Conn. 228, 235; *Shortall v. Hinkley*, 31 Ill. 219, 227; *ante*, § 146.

7 *Wright*, 2 Md. 429, 554; 56 Am. Dec. 723; 1 Bish. M. W. § 580.

8 *Jones v. Davies*, 5 Hurl. & N. 766; 7 Hurl. & N. 507, 508; *Winne*, 2 Lans. 21, 24.

9 *Winne*, 2 Lans. 21, 24. See *Kibbey v. Williams*, 58 Ill. 30, 31; *Cole v. Van Riper*, 44 Ill. 53, 66; *Winkler*, 18 W. Va. 455, 469.

10 *Ante*, § 22.

11 *Stewart M. & D.* § 443.

12 *Winne*, 2 Lans. 21, 26; *ante*, § 22.

13 *Jones v. Davies*, 5 Hurl. & N. 766; 7 Hurl. & N. 507, 508.

14 *Central v. Copeland*, 18 Md. 305, 320. See *Wells v. Thompson*, 13 Ala. 793; 48 Am. Dec. 76; *Shortall v. Hinkley*, 31 Ill. 219, 226.

15 *Shortall v. Hinkley*, 31 Ill. 219, 227; *Day v. Cochran*, 24 Miss. 261, 275; *Canby v. Porter*, 12 Ohio, 79, 80. See *Plumb v. Sawyer*, 21 Conn. 351; *Long v. Hitchcock*, 99 Ill. 550; *Anderson v. Tydings*, 8 Md. 427, 443; *Roberts v. Whiting*, 16 Mass. 186; *Winne*, 2 Lans. 21, 25; *Burd v. Dansdale*, 2 Binn. 50; *Mattock v. Stearns*, 9 Vt. 326.

16 *Ante*, §§ 113-118.

17 *Wickes v. Clarke*, 8 Paige, 161, 172.

18 *Van Duzer*, 6 Paige, 366, 370.

19 *Cooney v. Woodburn*, 33 Md. 320, 326; *ante*, § 157.

20 *Anderson v. Tydings*, 8 Md. 427, 443; *Staples v. Brown*, 13 Allen, 16; *Winne*, 2 Lans. 21, 25; *Curry v. Bott*, 53 Pa. St. 400, 403; *post*, § 161.

21 *Wheeler v. Hotchkiss*, 10 Conn. 225, 230; *Henderson v. Oldham*, 5 Dana, 251, 257; *Rice v. Hoffman*, 35 Md. 344, 349, 350; *Foster v. Marshall*, 22 N. H. 491, 493; *Stewart M. & D.* § 463; *ante*, §§ 22, 156; *post*, § 162.

- 22 Jones v. Davies, 7 Hurl. & N. 507, 508 ; Winne, 2 Lans. 21, 24.
- 23 Watson, 13 Conn. 83, 86 ; Stewart v. Ross, 50 Miss. 776, 791.
- 24 Rice v. Hoffman, 35 Md. 344, 350 ; Adair v. Lott, 3 Hill, 182.
- 25 Jones v. Davies, 7 Hurl. & N. 507 ; Watson, 13 Conn. 83, 86.
- 26 Watson, 13 Conn. 83, 86. See Coleman v. Waples, 1 Har. (Del.) 196 ; Willis v. Snelling, 6 Rich. 280.
- 27 See Forbes v. Sweesy, 8 Neb. 520 ; Winne, 2 Lans. 21.
- 28 Shortall, 31 Ill. 219, 227 ; Rice v. Hoffman, 35 Md. 354, 350 ; Miller v. Bledsod, 61 Mo. 96, 105.
- 29 Hall, 32 Ohio St. 184.
- 30 Grant v. Townsend, 2 Hill, 554.
- 31 Wells v. Thompson, 13 Ala. 793 ; 48 Am. Dec. 76 ; Bottoms v. Corley, 5 Ifeisk. 1, 5 ; *infra*, n. 33.
- 32 Shortall v. Hinkley, 31 Ill. 219, 226.
- 33 Maraman v. Caldwell, 8 Mon. B. 32 ; Flagg v. Bean, 25 N. H. 49 ; Koltenbrock v. Cracraft, 36 Ohio St. 584.
- 34 French v. Rollins, 21 Me. 372 ; McKee v. Pfout, 3 Dall. 486.
- 35 Anderson v. Tydings, 8 Md. 427, 443 ; *supra*, n. 15.
- 36 Armstrong v. Wilson, 60 Ill. 226, 228.
- 37 Weise v. Welsh, 30 N. J. Eq. 431, 434.

§ 159. How curtesy may be barred, defeated, or lost. — A husband being *sui juris* can, before<sup>1</sup> or after marriage,<sup>2</sup> make an agreement enforceable in equity<sup>3</sup> with his wife, whereby he relinquishes curtesy.<sup>4</sup> And as he can convey this estate,<sup>5</sup> he may of course release it to any one,<sup>6</sup> which he generally does by joining in his wife's conveyances.<sup>7</sup> But he cannot by disclaimer prevent its vesting on his wife's death.<sup>8</sup> The wife's property may be so settled by deed<sup>9</sup> or by statute<sup>10</sup> that curtesy never arises, or it may arise and be defeasible by her deed<sup>11</sup> or will;<sup>12</sup> but where her will is valid only with the husband's assent, he may revoke his assent any time before probate.<sup>13</sup> So by statute it may be forfeited by bigamy,<sup>14</sup> adultery,<sup>15</sup> or treason.<sup>16</sup> A divorce *a vinculo* destroys it.<sup>17</sup> It may be barred by limitations,<sup>18</sup> or by the acceptance of a provision in its stead.<sup>19</sup> Formerly, it was forfeited by an absolute conveyance of the lands,<sup>20</sup> but this law is obsolete.<sup>21</sup>

1 Waters v. Tagewell, 9 Md. 291, 303 ; Stewart M. & D. § 32.

- 2 *Hutchins v. Dixon*, 11 Md. 29, 37; *Stewart M. & D.* § 182; *ante*, §§ 40, *et seq.*, 99, *et seq.*
- 3 *Ante*, §§ 42, 53.
- 4 See also *Rochon v. Lecott*, 2 Stewt. 429.
- 5 *Ante*, § 158.
- 6 1 Wash. Real Prop. 152.
- 7 See *Carpenter v. Davis*, 72 Ill. 14; *Stewart v. Ross*, 50 Miss. 776. Compare *Jacques v. Ennis*, 25 N. J. Eq. 402; *Gilmore*, 7 Oreg. 374; *Honck v. Ritter*, 76 Pa. St. 280; *post*, §§ 394-408.
- 8 *Watson*, 13 Conn. 83, 86.
- 9 *Hutchins v. Dixon*, 11 Md. 29, 37, 38; *ante*, § 157.
- 10 *Tong v. Marvin*, 15 Mich. 60, 70, 73; *post*, § 161.
- 11 Under settlement, *Pool v. Blakie*, 53 Ill. 435, 502; under statute, *Porch v. Fries*, 18 N. J. Eq. 204, 208.
- 12 Under settlement, *Stokes v. McKibbin*, 13 Pa. St. 267, 269; under statute, *Stewart v. Ross*, 50 Miss. 776, 791.
- 13 *George v. Bussing*, 15 Mon. B. 563. See *Sibsby v. Bullock*, 10 Allen, 94.
- 14 Md. R. C. 1878, p. 807, § 102. See *Stewart M. & D.* § 178.
- 15 Not without: *Wells v. Thompson*, 13 Ala. 793; 48 Am. Dec. 76; 1 Greenl. Cruise, 150.
- 16 *Pemberton v. Hicks*, 1 Binn. 1.
- 17 *Stewart M. & D.* § 443.
- 18 *Shortall v. Hinkley*, 31 Ill. 219, 227. See *Wright v. Plumbtree*, 3 Barn. & Ald. 474; *Carter v. Cartrell*, 16 Ark. 154; *Neal v. Robertson*, 2 Dana, 86; *Thompson v. Green*, 4 Ohio St. 216; *Weisinger v. Murphy*, 2 Head, 674.
- 19 Pa. Purd. Dig. 1876, p. 1008, § 23; 77 Pa. St. 276, 379.
- 20 1 Greenl. Cruise, 150; *Boone Real Prop.* § 51; *ante*, § 158.
- 21 See *Dennett*, 40 N. H. 505; *Miller*, Meigs, 184.

§ 160. *Curtesy under statutes, generally.*—In the Revised Laws of Alabama, Arkansas, Colorado, Georgia, Louisiana, Minnesota, Missouri, South Carolina, Texas, and Virginia, there seems to be no mention of curtesy.<sup>1</sup> In those of Connecticut,<sup>2</sup> Delaware,<sup>3</sup> Maryland,<sup>4</sup> New Jersey,<sup>5</sup> New York,<sup>6</sup> Pennsylvania,<sup>7</sup> Rhode Island,<sup>8</sup> and Tennessee,<sup>9</sup> curtesy is incidentally mentioned as existing. In those of Kentucky,<sup>10</sup> Maine,<sup>11</sup> Massachusetts,<sup>12</sup> Michigan,<sup>13</sup> Nebraska,<sup>14</sup> New Hampshire,<sup>15</sup> North Carolina,<sup>16</sup> Ohio,<sup>17</sup> Oregon,<sup>18</sup> Vermont,<sup>19</sup> and West Virginia,<sup>20</sup> curtesy is expressly given. In those of California,<sup>21</sup> Florida,<sup>22</sup> Illinois,<sup>23</sup> Indiana,<sup>24</sup> Iowa,<sup>25</sup> Kansas,<sup>26</sup> Mississippi,<sup>27</sup> and Nevada,<sup>28</sup> curtesy is expressly abolished.

When curtesy is abolished another estate is generally given in its place, as in Illinois, where a husband like his wife has dower.<sup>29</sup> And when curtesy is recognized it is often expressly modified and made a different estate; as in Ohio, where birth of issue is done away with;<sup>30</sup> in West Virginia, where the wife must die seized;<sup>31</sup> in Wisconsin, where the wife must die intestate;<sup>32</sup> in Michigan, where a second husband has no curtesy if his wife leaves a child by her first husband;<sup>33</sup> and as in Minnesota, where it is forfeited by desertion.<sup>34</sup> But a statute giving curtesy will not be construed to change the requisites and incidents thereof, except so far as express words require.<sup>35</sup> Thus, the West Virginia statute, which provides "if a married woman die seized of an estate of inheritance in land, her husband shall be tenant by the curtesy in the same,"<sup>36</sup> does not do away with the necessity of birth of issue.<sup>37</sup> When, however, curtesy is not expressly given or abolished, it exists as a part of the common law,<sup>38</sup> except in Louisiana and Texas, where this law as to curtesy was never in force,<sup>39</sup> unless it is impliedly abolished by married women's separate property acts.<sup>40</sup> In any case these acts work important changes in common-law curtesy.<sup>41</sup> A statute providing that the husband shall not have curtesy when his wife has children by a former husband, applies only to lands which such children inherit, or their shares.<sup>42</sup>

1 There may be statutes in these States later than the Revised Laws. The laws of Minnesota do refer to curtesy, but only to repeal the acts relating thereto: Minn. Stats. 1878, p. 572.

2 Conn. G. S. 1875, p. 392, § 28.

3 Del. R. C. 1874, p. 478, § 1, p. 479, § 4.

4 Md. R. C. 1878, p. 397, § 2, p. 412, §§ 59, 60, p. 807, § 102.

5 N. J. Rev. 1877, p. 638, § 9, p. 639, § 14, p. 298, § 6, p. 1235, § 2.

6 N. Y. R. S. 1882, p. 2213, § 20.

7 Pa. Purd. Dig. 1876, p. 1007, § 18, p. 1008, § 23.

8 R. I. P. S. 1882, p. 424, § 14, p. 471, § 3, p. 190, § 8.

- 9 Tenn. R. S. 1873, §§ 2486, 3263.
- 10 Ky. R. S. 1871, p. 527, § 1.
- 11 Me. R. S. 1871, p. 758, § 15.
- 12 Mass. P. S. 1882, p. 740, §§ 1, 3, p. 818, § 1.
- 13 Mich. R. S. 1882, §§ 5770, 5783.
- 14 Neb. C. L. 1881, pp. 215, 255.
- 15 N. H. G. L. 1878, pp. 435, 475.
- 16 N. C. Bat. Rev. 1873, pp. 530, 531, 592.
- 17 Ohio R. S. 1880, §§ 2852, 3108, 4176, 4177.
- 18 Oreg. G. L. 1872, p. 588, § 30.
- 19 Vt. R. L. 1880, §§ 2229, 2230.
- 20 W. Va. R. S. 1879, p. 502, § 15, p. 556, §§ 17, 18.
- 21 Cal. Civ. Code 1881, § 173.
- 22 Fla. Dig. 1881, p. 471.
- 23 Ill. R. S. 1880, p. 425, § 1.
- 24 Ind. R. S. 1881, § 2482.
- 25 Iowa R. C. 1880, § 2440.
- 26 Kan. C. L. 1881, §§ 21, 29.
- 27 Miss. R. S. 1880, § 1170.
- 28 Nev. C. L. 1873, § 157.
- 29 Ill. R. S. 1880, p. 425, § 1. See also Ind. R. S. 1881, § 2485; Iowa R. S. 1880, § 2440.
- 30 Ohio R. S. 1880, § 4176. See also Oreg. G. L. 1872, p. 588, § 30; Dubs, 31 Pa. St. 154.
- 31 W. Va. R. S. 1879, p. 502, § 15; Winkler, 18 W. Va. 455, 468. See also Wis. R. S. 1878, § 2180.
- 32 Wis. R. S. 1878, § 2180.
- 33 Mich. R. S. 1882, § 5770. See also Neb. C. S. 1881, p. 215; Ohio R. S. 1880, § 476; Vt. R. L. 1880, § 2229.
- 34 Minn. R. S. 1878, p. 565.
- 35 See full discussion in Winkler, 18 W. Va. 455.
- 36 W. Va. R. S. 1879, p. 502, § 15.
- 37 Winkler, 18 W. Va. 455, 466, 468.
- 38 *Reaume v. Chambers*, 22 Mo. 36, 51; *Denny v. McCabe*, 32 Ohio St. 576, 578; *ante*, § 6.
- 39 \*See *ante*, § 6. In Texas the common law is declared in force, R. S. 1879, § 3128; but the community system prevails: *Post*, § 161.
- 40 *Post*, § 161.
- 41 *Post*, § 160.
- 42 *Kingsley v. Smith*, 14 Wis. 360, 362.

§ 161. **Curtesy under married women acts.**—Though some cases hold that statutes which secure to a married woman her property free from the control of her husband with power to dispose of it by will or deed by

implication wholly abolish curtesy,<sup>11</sup> it is generally said that the legislature must express all intended changes in common law estates,<sup>2</sup> and the prevailing opinion is, as in the case of equitable separate property,<sup>3</sup> that while separate property acts do suspend *during coverture* all the rights of the husband or his creditors in statutory separate property,<sup>4</sup> they do not destroy curtesy or prevent its vesting on her death,<sup>5</sup> unless such an event is clearly excluded,<sup>6</sup> as where the statute not only provides that the property of a wife shall be hers with power to will, etc., but also defines her husband's interest therein if she dies intestate,<sup>7</sup> in which case curtesy is excluded.<sup>8</sup> When she has power to alienate or charge her property<sup>9</sup> she may thereby defeat curtesy;<sup>10</sup> but a statute must contain express words to enable her to convey alone;<sup>11</sup> so when she has power to make a will she may thereby defeat curtesy.<sup>12</sup>

1 Tong v. Marvin, 15 Mich. 60, 70, 73; Ransom, 30 Mich. 328, 329; Stewart v. Ross, 50 Miss. 776, 790; Billings v. Baker, 23 Barb. 343, long discussion.

2 Winne, 2 Lans. 21, 34; Houston v. Brown, 7 Jones (N. C.) 161, 162; Winkler, 18 W. Va. 455, 469.

3 Pool v. Blakie, 53 Ill. 495, 502; *ante*, § .

4 Martin v. Robson, 65 Ill. 130, 131, 132; 16 Am. Rep. 573; Beach v. Miller, 51 Ill. 206, 209; 2 Am. Rep. 290; Cole v. Van Riper, 44 Ill. 58, 66; Rice v. Hoffman, 35 Md. 344, 350; Schindel, 12 Md. 194, 313; Anderson v. Tydings, 8 Md. 427, 443; Logan v. McGill, 8 Md. 461, 470; Brown v. Clark, 44 Mich. 409, 411; Porch v. Fries, 18 N. J. Eq. 204, 208; Hatfield v. Sneden, 54 N. Y. 230, 289; Winne, 2 Lans. 21, 26, 34; Hurd v. Cass, 9 Barb. 366, 369; Jones v. Carter, 73 N. C. 148, 149; Houston v. Brown, 7 Jones (N. C.) 161, 162; Clark, 76 Pa. St. 376, 478; Coleman v. Satterfield, 2 Head, 259, 264; Bottoms v. Corley, 5 Helsk. 1, 6, 9.

5 Cole v. Van Riper, 44 Ill. 58, 65, 66; Anderson v. Tydings, 8 Md. 427, 443; Rice v. Hoffman, 35 Md. 344, 350; Porch v. Fries, 18 N. J. Eq. 204, 209; Prall v. Smith, 31 N. J. L. 244, 246; Hatfield v. Sneden, 54 N. Y. 280, 287; Hurd v. Cass, 9 Barb. 366, 368-370; Winne, 2 Lans. 21, 26, 34; Leach, 21 Hun, 381, 382; Zimmerman v. Schoenfeldt, 3 Hun, 692, 695; Houston v. Brown, 7 Jones (N. C.) 161, 162; Winkler, 18 W. Va. 455, 464, 467; Kingsley v. Smith, 14 Wis. 269, 365.

6 Compare *ante*, § 157

7 Mason v. Johnson, 47 Md. 347, 357, 358.

8 See Md. R. C. 1878, p. 481, § 20, Minn. St. 1878, p. 565. Sometimes there is an express provision that the chapter on "descent" shall not affect curtesy: See N. Y. R. S. 1882, p. 2213, § 20.

9 Discussed *post*,

10 *Porch v. Fries*, 18 N. J. Eq. 204, 208 ; *ante*, § 159.

11 *Cole v. Van Riper*, 44 Ill. 58, 66 ; *post*, § 399.

12 *Stewart v. Ross*, 50 Miss. 776, 791 ; *post*, §§ 340-354. Unless the statute provides to the contrary : See N. H. G. L. 1878, p. 435.

§ 162. **Prospective and retrospective effect of statutes on curtesy.**—Unlike the husband's rights during coverture in right of his wife to lands of which she has possession,<sup>1</sup> curtesy initiate is not a vested right<sup>2</sup>—it does not vest till the wife's death,<sup>3</sup> and may therefore be destroyed by statute.<sup>4</sup> But if the statute does not expressly refer to existing rights it will be applied only to those which arise after its passage.<sup>5</sup> From another point of view, curtesy consummate is regarded as an estate acquired by descent,<sup>6</sup> and as rules of descent are determined by the law existing at the time of the ancestor's death,<sup>7</sup> during such ancestor's life the chance of its arising may be destroyed,<sup>8</sup> or it may be created to arise.<sup>9</sup>

1 *Van Note v. Downey*, 28 N. J. L. 219, 222 ; *ante*, §§ 22, 156, 159.

2 *Porter*, 27 Gratt. 599, 606 ; *Stewart M. & D.* § 443 ; *ante*, § 22.

3 *Hill v. Chambers*, 30 Mich. 422, 427 ; *ante*, §§ 156, 158.

4 *Strong v. Clem*, 12 Ind. 37, 41 ; *Hill v. Chambers*, 30 Mich. 422, 427 ; *Hathon v. Lyon*, 2 Mich. 93, 95 ; *Winne*, 1 Lans. 508, 513 ; 2 Lans. 21, 26 ; *Thurber v. Townsend*, 22 N. Y. 517 ; *Billings v. Baker*, 28 Barb. 343, 346 ; *Denny v. McCabe*, 35 Ohio St. 576, 580 ; *Mellinger v. Bausman*, 45 Pa. St. 522, 529 ; *Sharpless v. West*, 1 Grant, 257, 260 ; *Kingsley v. Smith*, 14 Wis. 360, 365 ; *ante*, § 161, n. 4.

5 *Porter v. Bowers*, 55 Md. 213, 215, 216 ; *ante*, § 20.

6 *Watson*, 13 Conn. 83, 86 ; *Rice v. Hoffman*, 35 Md. 344, 350 ; *Brown v. Clark*, 44 Mich. 309, 311 ; *Stewart v. Ross*, 50 Miss. 776, 790 ; *ante*, § 22.

7 *Ante*, § 22.

8 *Hill v. Chambers*, 30 Mich. 422, 427 ; *supra*, n. 4.

9 *Brown v. Clark*, 44 Mich. 309, 311.



## CHAPTER X.

## HUSBAND'S ESTATES IN WIFE'S PERSONALTY.

ART. I. IN GENERAL, §§ 163-165.

II. PERSONALTY IN POSSESSION, §§ 166-170.

III. CHOSSES IN ACTION, §§ 171-176.

IV. REDUCTION TO POSSESSION, §§ 177-183.

ART. I.—HUSBAND'S ESTATE IN WIFE' PERSONALTY  
IN GENERAL.

§ 163. At common law.

§ 164. In equity.

§ 165. Under Statutes.

§ 163. Husband's estate in wife's personalty at common law.—A married woman being at common law merged in her husband<sup>1</sup> could not hold property at all,<sup>2</sup> and as estates in personal property were unknown,<sup>3</sup> her husband did not take a mere estate during coverture in her personalty as he did in her realty,<sup>4</sup> but he took it absolutely.<sup>5</sup> Still as change of title to personalty was affected only by change of possession,<sup>6</sup> if the husband did not get possession while husband,<sup>7</sup> the title on dissolution of the marriage remained in her<sup>8</sup> or her representatives.<sup>9</sup> The common law rule, therefore, is that all the wife's *personalty in possession*<sup>10</sup> vests in the husband absolutely,<sup>11</sup> and that he may reduce her *choses in action*<sup>12</sup> to possession any time during coverture,<sup>13</sup> and thus make them his own absolutely;<sup>14</sup> otherwise they continue to belong to her.<sup>15</sup>

1 Burrell v. Coffin, 22 N. H. 118, 124; 53 Am. Dec. 236; ante, § 38.

2 Ante, § 137.

3 Ante, § 136.

4 Ante, §§ 146-150.

5 Fleet v. Perrins, 3 Q. B. 536, 541; 4 Q. B. 500, 507; Kesner v. Trigg, 98 U. S. 50, 54; Price v. Sessions, 3 How. 624, 635; McCaa v. Woolf, 42 Ala. 389, 392; Jacobs v. Adair, 31 Ark. 616, 623; Tryon v. Sut-

ton, 13 Cal. 490, 493; Morgan v. Thomas, 14 Conn. 99, 102; Johnson v. Fleetwood, 41 Har. (Del.) 442, 444; Pope v. Tucker, 23 Ga. 484, 487; Thomas v. Chicago, 55 Ill. 403, 406; Standiford v. Devol, 21 Ind. 404, 407; Campbell v. Galbreath, 12 Bush, 459, 464; Carleton v. Lovejoy, 54 Me. 445, 447; Sabel v. Slingsluff, 52 Md. 132, 135; Hayward, 20 Pick. 517, 522; Hopkins v. Carey, 23 Miss. 54, 58; Clark v. Bark, 47 Mo. 17, 19; Cadwell v. Hill, 47 N. H. 407, 410; Skillman, 13 N. J. Eq. 403, 406; Kenny v. Udall, 5 Johns. Ch. 464, 473; Stokes v. Macken, 62 Barb. 145, 149; O'Connor v. Harris, 81 N. C. 279, 282; Needles, 7 Ohio St. 432, 438; Mayer, 77 Pa. St. 482, 485; Arnold v. Ruggles, 1 R. I. 165, 178; Willis v. Snelling, 6 Rich. 280, 284; Ewing v. Helm, 2 Tenn. Ch. 368, 369; Wallace v. Burden, 17 Tex. 467, 468; Browning v. Headley, 2 Rob. (Va.) 340, 368; 40 Ala. Dec. 755; Barron, 24 Vt. 376, 392.

6 This seems to have been the reason, though the authorities do not refer to it.

7 *Post*, REDUCTION TO POSSESSION, §§ 177-183.

8 Stewart M. & D. §§ 445, 460; Hayward, 20 Pick. 517, 522; *post*, § 176.

9 Price v. McReynolds, 8 Lea, 36, 40. See O'Connor v. Harris, 81 N. C. 279, 282; Buckingham v. Carter, 2 Disn. 41, 43.

10 *Post*, §§ 166-170.

11 *Post*, § 170.

12 *Post*, §§ 171-176.

13 *Post*, §§ 177-183.

14 *Post*, § 176.

15 *Supra*, notes 8, 9; *post*, § 176.

## ‡ 164. Husband's estate in wife's personalty in equity. —

A husband has under the unwritten law the same rights in his wife's equitable personalty<sup>1</sup> as he has in her legal personalty.<sup>2</sup> unless it is personalty settled to her sole and separate use,<sup>3</sup> and except that when he has to appeal to equity to reduce a *chose in action*<sup>4</sup> the court may make a provision for her out of it.<sup>5</sup> Gifts from him to her are likewise sustained in equity<sup>6</sup>

1 See Vanderveer v. Alston, 16 Ala. 494; Lenoir v. Rainey, 15 Ala. 667; Lamb v. Wragg, 8 Port. 73; Lindsey v. Harrison, 3 Eng. 302, 311; Pope v. Tucker, 23 Ga. 484, 487; Beall v. Darden, 4 Ired. Eq. 76; McDonald v. Crockett, 2 McCord Ch. 130; Riddlehoover v. Kinard, 1 Hill Ch. 376; Eaves v. Gillespie, 1 Swan, 123; Ewing v. Helm, 2 Tenn. Ch. 368, 369.

2 *Ante*, § 163.

3 See Resor, 9 Ind. 347; George v. Spencer, 2 Md. Ch. 359, 360; Clark v. Maguire, 16 Mo. 302; *post*, WIFE'S EQUITABLE SEPARATE ESTATE, §§ 197-216.

4 *Post*, § 194.

5 *Post*, WIFE'S EQUITY, §§ 190-196.

6 Bent, 44 Vt. 555, 560; *ante*, §§ 42, 105, 127. Consult *post*, § 178.

§ 165. **Husband's estate in wife's personalty under statutes.**—Married women separate property acts usually destroy all the husband's rights in his wife's personalty;<sup>1</sup> but a statute relieving her property from liability for his debts does not.<sup>2</sup> These acts do not destroy any existing rights in personalty in possession,<sup>3</sup> for such rights are vested and cannot be destroyed;<sup>4</sup> and they are construed prospectively,<sup>5</sup> so as not to affect existing rights to property not in possession;<sup>6</sup> but a husband's mere right of reduction to possession is not vested and may be destroyed by express statute,<sup>7</sup> though the contrary view has in many cases prevailed.<sup>8</sup> In some States the husband is given special rights in his wife's *choses in action* after her death.<sup>9</sup>

1 See *Peck v. Hendersholt*, 14 Iowa, 40, 44; *Noble v. Milliken*, 74 Me. 225, 228; 43 Am. Rep. 581; *post*, WIFE'S STATUTORY SEPARATE ESTATE, §§ 217-243.

2 *Weems*, 19 Md. 334, 344.

3 *Farrell v. Patterson*, 43 Ill. 52, 58. See *Sharp v. Maxwell*, 30 Miss. 589; *Westervelt v. Gregg*, 12 N. Y. 202; *Rider v. Hulse*, 33 Barb. 264; *Hawkins v. Lee*, 22 Tex. 544.

4 *Ante*, § 22.

5 *Ante*, § 20.

6 *Stearns v. Weathers*, 30 Ala. 712, 713; *Kidd v. Montague*, 19 Ala. 619; *Anderson*, 1 Ala. Sel. Cas. 612; *Farrell v. Patterson*, 43 Ill. 52, 58.

7 *Henry v. Dilley*, 25 N. J. L. 302, 304, 305, 307; cases cited *ante*, § 22, note 21.

8 *Dunn v. Sargeant*, 101 Mass. 336, 339; cases cited *ante*, § 22, n. 22.

9 See Md. R. C. 1878, art. 50, § 92, p. 447; Md. Acts, 1882, ch. 477, p. 738; *Brown v. Bokee*, 53 Md. 155, 163.

## ARTICLE II.—PERSONALTY IN POSSESSION.

§ 166. Defined.

§ 167. Possession by wife.

§ 168. Possession by husband.

§ 169. Possession by third person.

§ 170. Husband's rights in.

§ 166. **Personalty in possession defined.**—In this connection the word "possession" applies properly only to corporeal property<sup>1</sup>—stocks, shares, etc., though

actually in hand are not property in possession;<sup>2</sup> and one's personalty in possession is such property as is detained and enjoyed by one as owner or by another for him<sup>3</sup>—property held by him in a representative capacity,<sup>4</sup> or adversely held by another,<sup>5</sup> is not his property in possession. Personalty in possession is perhaps best defined as *not choses in action*;<sup>6</sup> but it may be separately determined what possession by a husband<sup>7</sup> or by his wife,<sup>8</sup> or by a third person,<sup>9</sup> gives him her personalty absolutely under the common law.<sup>10</sup>

1 Fleet v. Perrins, 3 Q. B. 536, 541; Arnold v. Ruggles, 1 R. I. 165, 173; Bouv. Law Dict. "Possession."

2 Brown v. Bokee, 53 Md. 155, 164, 165; *post*, § 173.

3 Bouv. Law Dict. "Possession."

4 Price v. Sessions, 3 How. 624, 635; *post*, § 168.

5 Thrasher v. Ingham, 32 Ala. 645, 668; *post*, § 169.

6 See fully, *post*, § 171.

7 *Post*, § 168.

8 *Post*, § 167.

9 *Post*, § 169.

10 *Post*, § 170; *ante*, § 163.

§ 167. Possession by wife is possession of husband.—Whatever personalty is in a wife's possession is in the possession of her husband,<sup>1</sup> unless she holds it in a representative capacity,<sup>2</sup> or it is protected by some settlement<sup>3</sup> or statute.<sup>4</sup> Thus, chattels in the family home,<sup>5</sup> money in her pocket,<sup>6</sup> and articles used by her,<sup>7</sup> are in her husband's possession; stealing from her is stealing from him;<sup>8</sup> money received by her is his in law.<sup>9</sup> And this is true, although he has abandoned her<sup>10</sup>—unless this has been absolute and final<sup>11</sup>—and *prima facie* in spite of married women property acts.<sup>12</sup>

1 Bell, 37 Ala. 536, 542; *ante*, §§ 119-121.

2 Farrington v. Edgerly, 13 Allen, 453, 455. See Standiford v. Devol, 21 Ind. 404, 407.

3 *Ante*, § 164.

4 *Ante*, § 165.

5 Topley, 31 Pa. St. 328, 329; *ante*, § 119.

- 6 Cox v. Scott, 9 Baxt. 305, 310; *ante*, § 119.
- 7 Stokes v. Macken, 62 Barb. 145, 149.
- 8 Com. v. Williams, 7 Gray, 337, 338.
- 9 Cox v. Scott, 9 Baxt. 305, 311.
- 10 Bell, 37 Ala. 536, 542.
- 11 Stewart M. & D. § 177. See Coughlin v. Ryan, 47 Mo. 99; Dumond v. Magee, 4 Johns. Ch. 318; Rees v. Waters, 9 Watts, 90; *ante*, § 90.
- 12 Winter v. Walter, 27 Pa. St. 155, 161; *ante*, § 119.

§ 168. The husband's possession must be as husband.— A wife's personalty in the actual possession of her husband is not deemed in possession unless held by him as husband in exercise of his marital rights;<sup>1</sup> choses in his hands as trustee,<sup>2</sup> executor,<sup>3</sup> or agent,<sup>4</sup> are *choses in action*,<sup>5</sup> just as though he were a third person.<sup>6</sup> Except as against creditors,<sup>7</sup> he may give her any property whether acquired through her or not,<sup>8</sup> and when he is in possession of this or other separate property of hers the possession is hers.<sup>9</sup>

1 Wall v. Tomlinson, 16 Ves. 413, 416; Scarpellini v. Acheson, 7 Q. B. 864, 876; Baker v. Hall, 12 Ves. Jr. 499; Price v. Sessions, 3 How. 624, 635; Mayfield v. Clifton, 3 Stewt. 375; Savage v. Benham, 17 Ala. 119; Machem, 28 Ala. 374; Lockhart v. Cameron, 29 Ala. 355, 363; Vanderveer v. Alston, 16 Ala. 494; Lowe v. Cody, 29 Ga. 117, 120; Standiford v. Devo, 21 Ind. 404, 407; Resor, 9 Ind. 347; State v. Reigart, 1 Gill, 1, 26, 27; 39 Am. Dec. 628; Walker, 25 Mo. 367; Dunn v. Sargeant, 101 Mass. 336, 338; Vreeland, 15 N. J. Eq. 512; Caswell v. Hill, 41 N. H. 407, 410; Pierson v. Smith, 9 Ohio St. 554, 557; Walden v. Chambers, 7 Ohio St. 30; Ellis v. Baldwin, 1 Watts & S. 253, 256; Timbers v. Katz, 6 Watts & S. 290, 298; Hind, 5 Whart. 138; 34 Am. Dec. 542; Moyer, 77 Pa. St. 482, 485; Johnston, 21 Pa. St. 450, 453, 454; Gochenaur, 23 Pa. St. 460, 463; McCampbell, 2 Lea, 661, 663; Cox v. Scott, 9 Baxt. 305, 312; Barron, 24 Vt. 376, 392; Perry v. Wheelock, 49 Vt. 63, 67; *post*, §§ 169, 174, 178.

2 Wall v. Tomlinson, 16 Ves. 413, 416; Terrell v. Green, 11 Ala. 207, 216; Lowe v. Cody, 29 Ga. 117, 120; State v. Reigart, 1 Gill, 1, 26; Dunn v. Sargeant, 101 Mass. 336, 338; Moyer, 77 Pa. St. 482, 485.

3 Price v. Sessions, 3 How. 624, 625; Walker, 25 Mo. 367.

4 Pierson v. Smith, 9 Ohio St. 554, 557.

5 *Post*, § 172.

6 *Post*, § 169. Sometimes, therefore, it is in his possession, and sometimes not, since the possession of her agent is her husband's possession: *Post*, § 169.

7 *Ante*, §§ 113-118, 127.

8 Lockhart v. Cameron, 29 Ala. 355, 363; Fletcher v. Updike, 3 Hun, 350; Wesco, 52 Pa. St. 195; *ante*, § 127.

9 *Ante*, §§ 119, 120.

§ 169. Possession of third person for husband or wife is possession of husband. — Personality belonging to the wife in the possession of her agent,<sup>1</sup> or bailee,<sup>2</sup> or trustee<sup>3</sup> (for the husband's rights attach to equitable property<sup>4</sup>), or guardian,<sup>5</sup> or tenant in common,<sup>6</sup> or any one not holding adversely,<sup>7</sup> is constructively in the possession of her husband; but not property held adversely,<sup>8</sup> or held by one who stands simply in relation of debtor to the wife,<sup>9</sup> or who holds as trustee, administrator, etc., property of some estate in which she has an interest,<sup>10</sup> her legacies, distributive shares, etc., being *choses in action*.<sup>11</sup> The estate must be settled up,<sup>12</sup> or her interest definitely determined and set off,<sup>13</sup> before an executor or trustee ceases to hold for his estate and holds for her;<sup>14</sup> and this is true when her husband is such executor or trustee, and he holds as husband only when his representative duties have ceased.<sup>15</sup> There is little difficulty in the application of these rules to chattels,<sup>16</sup> but a serious question whether one who holds money for her is not simply her creditor.<sup>17</sup> It seems settled that money collected by her agent inures at once to the benefit of her husband;<sup>18</sup> but while he may check on her money in bank,<sup>19</sup> money with a banker is money lent to him, and is a *chose in action*,<sup>20</sup> and any part of it left standing in her name when coverture ceases remains hers.<sup>21</sup>

1 Turton, 6 Md. 375, 381; *infra*, n. 18.

2 Magee v. Toland, 8 Port. 36, 37; Gwynn v. Hamilton, 29 Ala. 233, 237; Armstrong v. Simonton, 2 Murph. 351, 352; Whitaker, 1 Dev. 310, 311; Granbery v. Mhoon, 1 Dev. 456, 458; Pettijohn v. Beasley, 4 Dev. 512.

3 Pope v. Tucker, 23 Ga. 484, 487; Miller v. Bingham, 1 Ired. Eq. 423; 36 Am. Dec. 58; Murphy v. Grieve, 2 Dev. & B. Eq. 199.

4 *Ante*, § 164.

5 Sallie v. Arnold, 32 Mo. 532, 540. See Chambers v. Perry, 17 Ala. 726, 730; McDaniel v. Whitman, 16 Ala. 343; Nicholson v. Wilborn, 13 Ga. 417; Wood v. Henderson, 3 Miss. 893; Stephens v. Doak, 2 Ired. Eq. 348; Davis, 60 Pa. St. 118, 122; Godbold v. Bass, 12 Rich. 202; Daniel, 2 Rich. Eq. 115; 44 Am. Dec. 244; Ryan v. Bull, 3 Strob. Eq. 86; Guerrant v. Hocker, 7 Leigh, 366.

6 Walker v. Fenner, 28 Ala. 367, 373; Hopper v. McWhorter, 13 Ala. 229, 231; Chambers v. Perry, 17 Ala. 726, 730; Hyde v. Stone, 9 Cowen, 230, 232; Coffee v. Kelley, Busb. Eq. 48, 50; Ordinary v. Geiger, 1 Brev. 484, 485.

7 Fleet v. Perrins, 4 Q. B. 500, 508; Walker, 41 Ala. 353, 357; Hawkins v. Providence, 119 Mass. 596, 599; 20 Am. Dec. 353; Brown v. Fitz, 13 N. H. 283, 286; Coffee v. Kelley, Busb. Eq. 48, 50; Sansey v. Gardner, 1 Hill (S. C.) 191; Wallace v. Burden, 17 Tex. 467; *infra*, n. 8.

8 Fleet v. Perrins, 3 Q. B. 536, 542; Thrasher v. Ingham, 32 Ala. 645, 663; Broome v. King, 10 Ala. 819; Fightmaster v. Beasley, 1 Marsh. J. J. 606; Armstrong v. Simonton, 2 Murph. 351, 352; *supra*, n. 7. *Contra*, Pope v. Tucker, 23 Ga. 487; Wellborn v. Weaver, 17 Ga. 267, 270; Hooper v. Howell, 50 Ga. 165, 169.

9 Because a debt is of course a *chose in action*: *Post*, § 171.

10 Schnyler v. Hoyle, 5 Johns. Ch. 196, 212; Smilie, 22 Pa. St. 130, 133; *post*, § 172.

11 Hayward, 20 Pick. 517, 519-530; *post*, §§ 173, 174.

12 Harper v. Archer, 8 Smedes & M. 229, 232; 43 Am. Dec. 472; Schnyler v. Hoyle, 5 Johns. Ch. 196, 212; Parks v. Cushman, 9 Vt. 320, 325; *post*, § 174.

13 Moss v. Ashbrooks, 20 Ark. 128, 134, 135; Carley, 22 Ga. 178, 183; Hooper v. Howell, 52 Ga. 315, 323; 50 Ga. 165, 168; Abington v. Travis, 15 Mo. 240, 244; Swanson, 2 Swan, 446, 460.

14 See cases cited *post*, § 172.

15 Vanderveer v. Alston, 16 Ala. 494; Walker, 25 Mo. 367; Mardree, 9 Ired. 295, 305; Ellis v. Baldwin, 1 Watts & S. 253, 256; Walden v. Chambers, 8 Ohio St. 30; *ante*, § 168.

16 See McNeill v. Arnold, 17 Ark. 154, 171; Sadler v. Bean, 4 Eng. 202; Abington v. Travis, 15 Mo. 240, 244; cases cited *supra*.

17 *Infra*, n. 20.

18 Dardier v. Chapman, Law R. 11 Ch. D. 442; Crosby v. Otis, 32 Me. 256, 259; Turton, 6 Md. 375, 381.

19 Clark v. Bank, 47 Mo. 17, 19.

20 Pott v. Clegg, 11 Jur. 283, 290; Carr, 1 Mer. 541, 543; Hill v. Foley, 1 Phill. (N. C.) 399, 404.

21 Scrutton v. Patillo, Law R. 19 Eq. 363, 373; Fleet v. Perrins, 4 Q. B. 500, 508; Lloyd v. Pugh, Law R. 14 Eq. 241; Law R. 8 Ch. 88; *ante*, § 128; *post*, § 176.

§ 170. Husband's rights in wife's personalty in possession.—All the wife's personalty in possession<sup>1</sup> at the time of the marriage,<sup>2</sup> or thereafter coming into possession,<sup>3</sup> vests in her husband absolutely on the marriage, or as soon as it is acquired.<sup>4</sup> Thus, he owns absolutely money in her possession at the time of her marriage,<sup>5</sup> or personalty bought by her,<sup>6</sup> given her,<sup>7</sup> collected by her,<sup>8</sup> or money arising from the sale of her lands;<sup>9</sup> and in her place he is tenant in common<sup>10</sup> or life ten-

ant.<sup>11</sup> Such property goes to his administrator;<sup>12</sup> he sues alone for an injury to it,<sup>13</sup> and is sued alone for damage done by it;<sup>14</sup> if she attempts to dispose of it he may recover it back;<sup>15</sup> if he forfeits her life interest the forfeiture inures to the benefit of the remainderman;<sup>16</sup> a gift of such property to her stands on the same footing as one of property which she never owned,<sup>17</sup> whether as between them<sup>18</sup> or as against creditors;<sup>19</sup> and such property is liable for his debts.<sup>20</sup> He does not, however, take as purchaser,<sup>21</sup> or any greater interest than she had.<sup>22</sup>

1 Defined, *ante*, ‡ 166-169.

2 *Cram v. Dudley*, 28 N. H. 537, 541; cases *infra*, n. 4.

3 *Skillman*, 13 N. J. Eq. 403, 406; cases *infra*, n. 4.

4 *Agar v. Blethyn*, 1 Tyrw. & G. 160; *Carre v. Brice*, 7 Mees. & W. 183; *Barrack v. McCulloch*, 3 Kay & J. 110; *Lamphir v. Creed*, 8 Ves. 599, 600; *Kesner v. Trigg*, 98 U. S. 50, 54; *Mobley v. Leophart*, 47 Ala. 257, 261; *Colbert v. Daniel*, 32 Ala. 314, 327; *Nelson v. Goree*, 34 Ala. 565; *Hopper v. McWhorter*, 18 Ala. 229; *Jamison v. May*, 13 Ark. 600; *McNeill v. Arnold*, 17 Ark. 154, 171; *Morgan v. Thames*, 14 Conn. 99, 102; *Pope v. Tucker*, 23 Ga. 484, 487; *Farrell v. Patterson*, 43 Ill. 52, 53; *Mahoney v. Bland*, 14 Ind. 176; *Hawkins v. Craig*, 6 Mon. 254, 257; *Quigley v. Muse*, 15 La. An. 197; *Carleton v. Lovejoy*, 54 Me. 445; *Jordan*, 52 Me. 320; *Crosby v. Otis*, 32 Me. 256, 259; *Sabel v. Slingluff*, 52 Md. 132, 135; *Plummer v. Jarman*, 44 Md. 632, 637; *Hawkins v. Providence*, 119 Mass. 506, 509; 20 Am. Rep. 353; *Legg*, 8 Mass. 99, 101; *Hopkins v. Carey*, 23 Miss. 54, 58; *Clark v. Bank*, 47 Mo. 17, 19; *Walker*, 24 Mo. 367; *Abington v. Travis*, 15 Mo. 240, 244; *Cram v. Dudley*, 28 N. H. 537, 541; *Hall v. Young*, 37 N. H. 135, 144; *Skillman*, 13 N. J. Eq. 403, 406; *Fletcher v. Updike*, 3 Hun. 350; *Stokes v. Macken*, 62 Barb. 145, 149; *Black v. Justice*, 86 N. C. 504, 511; *Armstrong v. Simonton*, 2 Murph. 351, 352; *Walden v. Chambers*, 7 Ohio St. 30; *Moyer*, 77 Pa. St. 482, 485; *Davis*, 60 Pa. St. 118, 122; *Ewing v. Helm*, 2 Tenn. Ch. 368, 369; *Cox v. Scott*, 9 Baxt. 305, 312; *Wallace v. Burden*, 19 Tex. 467; *Rawlings v. Rounds*, 27 Vt. 17; *Bent*, 44 Vt. 555, 560; *Barron*, 24 Vt. 376, 392; *ante*, ‡ 163.

5 *Cox v. Scott*, 9 Baxt. 305, 310; *ante*, ‡ 167.

6 *Lamphir v. Creed*, 8 Ves. 599, 600.

7 *Ewing v. Helm*, 2 Tenn. Ch. 368, 369. See *Burns v. Hudson*, 1 Ala. Sel. Cas. 321; *Frierson*, 21 Ala. 540; *Campbell v. Galbreath*, 12 Bush, 459, 464; *Polk v. Allen*, 19 Mo. 467.

8 *Turton*, 6 Md. 375, 381; *Cox v. Scott*, 9 Baxt. 305, 311.

9 *Kesner v. Trigg*, 98 U. S. 50, 54; *Crosby v. Otis*, 32 Me. 256, 259; *Sabel v. Slingluff*, 52 Md. 132, 135; *Plummer v. Jarman*, 44 Md. 632, 637; *Hackett v. Shuford*, 86 N. C. 144, 149; *Black v. Justice*, 86 N. C. 504, 511; *Cox v. Scott*, 9 Baxt. 305, 312; *ante*, ‡ 136.

10 *Hopper v. McWhorter*, 18 Ala. 229, 231; cases *ante*, ‡ 169, n. 6.



11 *Colbert v. Daniel*, 32 Ala. 314, 327; *Smith v. Atwood*, 14 Ga. 402; *Darnall v. Adams*, 13 Mon. B. 273; *Robinson v. Rice*, 20 Mo. 229, 234; *Warner*, 33 Miss. 547, 549; *Stockton v. Martin*, 2 Bay, 471; *Green v. Goodall*, 1 Cold. 404; *Deadrigh v. Armour*, 10 Humph. 583.

12 *Colbert v. Daniel*, 32 Ala. 314, 327; *Standiford v. Devo*, 21 Ind. 404, 407; *Hawkins v. Craig*, 6 Mon. 254, 257; *Crosby v. Otis*, 32 Me. 256, 259; *Stewart M. & D.* § 460.

13 *Rawlings v. Rounds*, 27 Vt. 17.

14 *Cram v. Dudley*, 28 N. H. 537, 541.

15 *Casey v. Wiggin*, 8 Gray, 231.

16 *Warner*, 33 Miss. 547, 549.

17 Consult *ante*, § 127.

18 See *Lockhart v. Cameron*, 23 Ala. 355; *Wesco*, 52 Pa. St. 195; *Bent*, 41 Vt. 555, 560.

19 See *Fletcher v. Updike*, 3 Hun, 350.

20 *Morgan v. Thames*, 14 Conn. 99, 102.

21 *Willis v. Snelling*, 6 Rich. 280, 284.

22 *Robinson v. Rice*, 20 Mo. 229, 234.

### ARTICLE III.—CHOSSES IN ACTION.

§ 171. Defined.

§ 172. Chattels out of possession.

§ 173. Bonds, stock, notes, etc.

§ 174. Legacies, distributive shares, etc.

§ 175. Remainders, possibilities, etc.

§ 176. Husband's rights in.

§ 171. *Choses in action defined.*—The word “chose-in-action” has never been satisfactorily defined.<sup>1</sup> It means primarily “a right to be asserted in an action at law,”<sup>2</sup> “a right to recover something in an action,”<sup>3</sup> but it may also be an equitable right,<sup>4</sup> and the right to sue is not necessarily involved, for United States bonds are choses in action.<sup>5</sup> It includes all rights to one's ascertained chattels (corporeal personalty) out of one's actual or constructive possession,<sup>6</sup> and all one's incorporeal personalty in hand or not,<sup>7</sup> all debts or evidence of indebtedness,<sup>8</sup> and all unascertained interests.<sup>9</sup> To illustrate: A wife's right to a chattel, wrongfully taken from her before marriage, is a chose in action;<sup>10</sup> so is her interest in one half of a lot of slaves before they

are divided;<sup>11</sup> so is her "thirds" in a former husband's estate before it is settled up;<sup>12</sup> so is her interest in a lottery prize before she has received it,<sup>13</sup> or in the proceeds of realty sold in partition proceedings,<sup>14</sup> or in realty left to a trustee to be sold and distributed to her;<sup>15</sup> so are her bonds, stocks, notes, etc.,<sup>16</sup> her legacies, etc.,<sup>17</sup> her remainders, etc.;<sup>18</sup> and so is money in her name in bank.<sup>19</sup> The income of a chose in action is a chose in action.<sup>20</sup>

1 See *Bushnell v. Kennedy*, 9 Wall. 387; *Hill v. Winne*, 1 Biss. 275; *Magee v. Toland*, 8 Port. 40; *Pitts v. Curtis*, 4 Ala. 350; *Devine v. Harvey*, 7 Mon. 443; *Haskell v. Blair*, 3 Cush. 354; *Zollar v. Janvrin*, 49 N. H. 115; 6 Am. Rep. 467; *Gillett v. Fairchild*, 4 Denio, 80; *Ramsey v. Gould*, 57 Barb. 408; *People v. Troja*, 19 Wend. 75; *Dial v. Gary*, 14 S. C. 538; *Gibson*, 43 Wis. 23; 28 Am. Rep. 527; *Noonan v. Orton*, 34 Wis. 259; 17 Am. Rep. 441; and cases cited in this article.

2 *Fleet v. Perrins*, Law R. 4 Q. B. 500, 508; Law R. 3 Q. B. 536, 542.

3 *Fleet v. Perrins*, Law R. 4 Q. B. 500, 508.

4 *Oswald v. Hoover*, 43 Md. 360, 369; *Gillis v. McCoy*, 4 Dev. 172, 179.

5 *Brown v. Bokee*, 53 Md. 155, 164. See *Dundas v. Dutens*, 1 Ves. Jr. 196; *Scawen v. Blunt*, 7 Ves. 294; *Wildman*, 9 Ves. 174; *Hutchins v. State*, 12 Met. 421.

6 See *ante*, §§ 166-170.

7 *Arnold v. Ruggles*, 1 R. I. 165, 173; *post*, §§ 173-175.

8 *Brown v. Bokee*, 53 Md. 155, 164; *post*, § 173.

9 *Hooper v. Howell*, 52 Ga. 315, 323; 50 Ga. 165, 168; cases *ante*, § 169, n. 13; *post*, § 174.

10 *Armstrong v. Simonton*, 2 Murph. 351, 352.

11 *Moss v. Ashbrooks*, 20 Ark. 123, 134, 135; *Corley*, 22 Ga. 178, 183; *Swanson*, 2 Swan, 446, 460.

12 *Harper v. Archer*, 8 Smedes & M. 229, 232; 43 Am. Dec. 472.

13 *Salter v. Williams*, 10 Ga. 186, 189.

14 *Oswald v. Hoover*, 43 Md. 360, 369.

15 *Smilie*, 22 Pa. St. 130, 133; *post*, § 174.

16 *Post*, § 173.

17 *Post*, § 174.

18 *Post*, § 175.

19 *Scrutton v. Patillo*, Law R. 19 Eq. 369, 373; *ante*, § 169.

20 *Wilkinson v. Charlesworth*, 11 Jur. 644, 645.

§ 172. Chattels out of possession as choses in action. — Chattels out of the actual or constructive possession of the husband or wife<sup>1</sup>—that is to say, chattels held

adversely by a third person,<sup>2</sup> are choses in action.<sup>3</sup> Thus, the wife's interest in a chattel wrongfully taken from her is merely a chose in action,<sup>4</sup> but it becomes a chattel in possession if replevied by the husband.<sup>5</sup> A contrary view has sometimes prevailed, and any chattel belonging to the wife, whether held by another adversely or not, has been treated as a chose in possession,<sup>6</sup> but this view is not the better one.<sup>7</sup> How far money can be treated as a chattel seems doubtful:<sup>8</sup> on the one hand, it may be said that any one who holds another's money is a debtor to that other,<sup>9</sup> and every debt is a chose in action;<sup>10</sup> on the other, possession of one's agent is one's own possession,<sup>11</sup> and money collected by the wife's agent has always been treated as in the possession of her husband.<sup>12</sup>

1 *Ante*, §§ 167-169.

2 *Ante*, § 169.

3 *Thrasher v. Ingham*, 32 Ala. 645, 663; *ante*, § 169.

4 *Armstrong v. Simonton*, 2 Murph. 351, 352.

5 *McNeill v. Arnold*, 17 Ark. 154, 171.

6 *Pope v. Tucker*, 23 Ga. 484, 487; *Wellborn v. Weaver*, 17 Ga. 267, 270; *Hooper v. Howell*, 50 Ga. 165, 169. But see *Hooper v. Howell*, 52 Ga. 315, 323.

7 1 Bish. M. W. § 71; *ante*, § 169.

8 *Ante*, § 169.

9 A debtor is one "who may be constrained to pay what he owes": Bouv. Law Dict. "debtor"; and any one who has another's money may be sued for money "had and received." The wife's banker is her debtor: *Ante*, § 169.

10 *Brown v. Bokee*, 53 Md. 155, 164; *ante*, § 171.

11 *Gwynn v. Hamilton*, 29 Ala. 233, 237.

12 *Turton*, 6 Md. 375, 381. See *Dardler v. Chapman*, Law R. 11 Ch. D. 442; *Crosby v. Otis*, 32 Me. 256, 259.

§ 173. Bonds, shares of stock, promissory notes, etc., as choses in action. — Bonds,<sup>1</sup> shares of stock,<sup>2</sup> promissory notes,<sup>3</sup> and other such incorporeal property,<sup>4</sup> or evidences of indebtedness,<sup>5</sup> though in possession,<sup>6</sup> are choses in action. The fact that they are negotiable makes no difference,<sup>7</sup> though a contrary view was for-

merly held;<sup>8</sup> but if they pass as money without indorsement they are treated as money.<sup>9</sup>

1 *Brown v. Bokee*, 53 Md. 155, 164. See *Dundas v. Dutens*, 1 Ves. Jr. 196; *Scawen v. Blunt*, 7 Ves. 234; *Wildman*, 9 Ves. 174; *Hutchins v. State*, 12 Met. 421; *Slaymaker v. Bank*, 10 Pa. St. 373, 376.

2 *Arnold v. Ruggles*, 1 R. I. 165, 178. See *Nicholson v. Drury*, Law R. 7 Ch. Div. 48, 55; *Blount v. Bestland*, 5 Ves. Jr. 515; *Goumar v. Eslava*, 20 Ala. 732; *Winslow v. Crocker*, 17 Me. 29, 31; *Brown v. Bokee*, 53 Md. 155, 164; *Phelps*, 20 Pick. 556, 560; *Stanwood*, 17 Mass. 57; *Reciprocity Bank*, 22 N. Y. 9.

3 *Dixon*, 18 Ohio, 113, 115. See *Richards*, 2 Barn. & Adol. 447; *Gaters v. Madeley*, 6 Mees. & W. 427; *Linderman v. Talley*, 1 Houst. 523; *Turpin v. Thompson*, 2 Met. (Ky.) 420; *Russ v. George*, 45 N. H. 467, 469; *Wilder v. Aldrich*, 2 R. I. 518.

4 See *Hore v. Becher*, 12 Sim. 465, 467; cases cited *supra*.

5 See *Scrutton v. Patillo*, Law R. 19 Eq. 363, 373; cases cited *supra*.

6 *Brown v. Bokee*, 53 Md. 155, 167, 163.

7 *Russ v. George*, 45 N. H. 467, 469; cases cited *supra*, n. 3.

8 See *Barlow v. Bishop*, 1 East, 432; *McNeillage v. Holloway*, 1 Barn. & Ald. 213.

9 See *Brown v. Bokee*, 53 Md. 155, 163, 164, 165. And see *Lenderman v. Talley*, 1 Houst. 523; *Russ v. George*, 45 N. H. 467; *Holmes*, 28 Vt. 765. As to money, see *ante*, §§ 166, 169, 172.

§ 174. *Legacies, distributive shares, etc., as choses in action.*—Legacies<sup>1</sup> and distributive shares<sup>2</sup> until delivery are choses in action.<sup>3</sup> Until the estate is settled up the administrator holds for the estate and adversely to the legatees and distributees,<sup>4</sup> and all property adversely held is chose in action;<sup>5</sup> but after it is settled up he may hold simply as agent for the parties entitled, that is to say, instead of a delivery to such parties, there may be a delivery from himself as administrator to himself individually,<sup>6</sup> and such parties may be in possession through him as agent or bailee.<sup>7</sup> Ordinarily, actual possession of a specific legacy, however acquired, makes it property in possession.<sup>8</sup> The same principles are applicable to a wife's interests in property to be sold and divided,<sup>9</sup> or simply to be divided.<sup>10</sup>

1 *Walker*, 41 Ala. 353, 358; *Wells v. Tyler*, 25 N. H. 340, 342; *infra*, n. 3.

2 Hayward, 20 Pick. 517, 519-530; *infra*, n. 3.

3 Carr v. Taylor, 10 Ves. Jr. 574, 578; Bibb v. McKinley, 9 Port. 636; Machem, 28 Ala. 374; Walker, 41 Ala. 353, 358; Stewart, 31 Ala. 207, 216; Jacks v. Adair, 31 Ark. 616; Sadler v. Bean, 9 Ark. 202; Cantrell, 16 Ark. 154; Wiggins v. Blount, 33 Ga. 409; Hooper v. Howell, 50 Ga. 165; Chappell v. Causey, 11 Ga. 25; Bell, 1 Ga. 637; McCauley v. Rodes, 7 Mon. B. 462; Willis v. Roberts, 48 Me. 257; Turton, 6 Md. 375, 382; Norris v. Lantz, 18 Md. 260; Hayward, 20 Pick. 517, 519; Foster v. Fifield, 20 Pick. 67, 70; Com. v. Manby, 12 Pick. 173, 175; Lowry v. Houston, 4 Miss. 394; Wade v. Grimes, 8 Miss. 425; Waiker, 24 Mo. 367; Gillet v. Camp, 19 Mo. 404; Polk v. Allen, 19 Mo. 467; Abington v. Travis, 15 Mo. 240, 244; Leakey v. Maupin, 10 Mo. 363; 47 Am. Dec. 120; Wells v. Tyler, 25 N. H. 340, 342; Wheeler v. Moore, 13 N. H. 478; Marston v. Carter, 12 N. H. 159; Schuyler v. Hoyle, 5 Johns. Ch. 196, 212; Shirley, 9 Paige, 363; Hardie v. Cotton, 1 Ired. Eq. 61, 65; Poin-dexter v. Blackburn, 1 Ired. Eq. 286, 288; Revel, 2 Dev. & B. 272; Curry v. Fulkinson, 14 Ohio, 100; Skinner, 5 Pa. St. 262, 263; Ellis v. Baldwin, 1 Watts & S. 253; Stewart, 3 Watts & S. 476; Dennison v. Nigh, 2 Watts, 90; Kirtzinger, 2 Ashm. 455; Lewis v. Price, 3 Rich. Eq. 172; Hill, 1 Strob. Eq. 1; Dawson, 2 Strob. Eq. 34; Harris v. Taylor, 3 Sneed, 536, 540; Hall v. McLain, 11 Humph. 425; Probate v. Niles, 32 Vt. 775, 778; Short v. Moore, 10 Vt. 664; Parks v. Cushman, 9 Vt. 320, 325.

4 Schuyler v. Hoyle, 5 Johns. Ch. 196, 212; *ante*, § 169.

5 *Ante*, §§ 169, 172.

6 See Mardree, 9 Ired. 295, 305; Parks v. Cushman, 9 Vt. 320, 325.

7 *Ante*, § 169.

8 Sadler v. Bean, 4 Eng. 202; Abington v. Travis, 15 Mo. 240, 244.

9 Smilie, 22 Pa. St. 130, 133.

10 Moss v. Ashbrooks, 20 Ark. 123, 134, 135; Corley, 22 Ga. 178, 183; Swanson, 2 Swan, 446, 460.

§ 175. **Remainders, possibilities, etc., as choses in action.**  
—Rights of future enjoyment, whether vested<sup>1</sup> or contingent,<sup>2</sup> the various kinds of remainders, reversions, etc., are at most choses in action.<sup>3</sup> It is said that a husband has no rights at all in property which he cannot get possession of during coverture, without being a trespasser,<sup>4</sup> for how can there be a right of action until there is a present right of enjoyment?<sup>5</sup> So that even when the husband was life tenant and his wife remainder-man, his right to sell<sup>6</sup> the whole property was denied.<sup>7</sup> But there are cases recognizing the same rights in future as in present interests.<sup>8</sup>

1 Caplinger v. Sullivan, 2 Humph. 548, 549; 37 Am. Dec. 575; *infra*, n. 3.

2 Price v. Sessions, 3 How. 624, 635; Taylor v. Wilson, 8 Rich. 285, 286.

H. & W. — 22.

3 Box, 6 I. R. Eq. 174, 195; Gibson v. Land, 27 Ala. 117; Cox v. Morrow, 14 Ark. 603, 620; Lynn v. Bradley, 1 Met. (Ky.) 232, 235; Ewing v. Handley, 4 Litt. 346, 356; Banks v. Marksberry, 3 Litt. 275, 284; Ring v. Baldridge, 7 Mon. B. 535; Holloway v. Conner, 3 Mon. B. 395; Turner v. Davis, 1 Mon. B. 151, 152; Houck v. Camplin, 25 Mo. 378, 379; Hardie v. Cotton, 1 Ired. Eq. 61, 65; Howell, 3 Ired. Eq. 528; 47 Am. Dec. 335; McBride v. Choate, 2 Ired. Eq. 610, 613; Larey v. Beagley, 9 Rich. Eq. 119, 122; Duke v. Palmer, 10 Rich. Eq. 380; Cobeen v. Gordon, 1 Hill Ch. 51; Caplinger v. Sullivan, 2 Humph. 548, 549; 37 Am. Dec. 575; Bugg v. Franklin, 4 Sneed, 129; Tune v. Cooper, 4 Sneed, 296; Crittenden v. Tosey, 1 Head, 311; Hayes v. Ewell, 4 Gratt. 11, 15; Henry v. Graves, 16 Gratt. 244; Street v. Pinsley, 2 Pat. & H. 612; Dade v. Alexander, 1 Wash. (Va.) 30; Upshaw, 2 Hen. & M. 381; 3 Am. Dec. 632. These are nearly all slave cases.

4 Hair v. Avery, 28 Ala. 267.

5 See Lynn v. Bradley, 1 Met. (Ky.) 232, 235.

6 See *post*, ‡ 181.

7 Crittenden v. Tosey, 1 Head, 311.

8 Walker, 41 Ala. 353, 357; Walker v. Fenner, 23 Ala. 367, 373; Pitts v. Curtis, 4 Ala. 350, 351; Smilie, 22 Pa. St. 130, 133; Webb, 21 Pa. St. 248, 250; Woelper, 2 Pa. St. 71; *post*, ASSIGNMENT, ‡ 181.

‡ 176. **Husband's rights in wife's choses in action.**—The husband's only right over his wife's choses in action is to reduce them to possession;<sup>1</sup> when so reduced they are personalty in possession, and vest absolutely in him.<sup>2</sup> This right to reduce is said to be a personal one,<sup>3</sup> and must be exercised during coverture;<sup>4</sup> it ceases with the death of either party,<sup>5</sup> or with absolute divorce.<sup>6</sup> Ignoring the case of divorce, in which case the chose in action simply remains the wife's discharged of the husband's power to reduce,<sup>7</sup> and that of the death of the wife, in which case it goes to her representative,<sup>8</sup> who at common law was always her husband,<sup>9</sup> it is usually said that choses in action differ from choses in possession in that the former survive to the wife.<sup>10</sup> More correctly, if a husband dies before reducing to possession his wife's choses in action, antenuptial<sup>11</sup> or postnuptial,<sup>12</sup> they survive to her in her own right.<sup>13</sup> Therefore a husband cannot dispose of them by will,<sup>14</sup> and his right to assign,<sup>15</sup> release,<sup>16</sup> exchange them,<sup>17</sup> etc., exists only as a part of his right to reduce them to possession.<sup>18</sup> Reduction to possession thus remains to

be considered.<sup>19</sup> Though choses in action are "property,"<sup>20</sup> they are not so far the husband's property as to pass under an assignment of "all his personal property,"<sup>21</sup> or probably that his rights in them can be seized by his creditors,<sup>22</sup> or cannot be destroyed by statute.<sup>23</sup> While his wife's shares are unreduced, the husband is not liable as a member of the company which issued them.<sup>24</sup>

1 *Post*, §§ 177-183.

2 *Cox v. Scott*, 7 Baxt. 305, 310; *ante*, § 170.

3 *Andover v. Merrimack*, 37 N. H. 437, 444. Compare *Ware*, 23 Gratt. 670, 673. See *post*, § 177.

4 *Rice v. McReynolds*, 8 Lea, 36, 40.

5 *Buchingham v. Carter*, 2 Disn. 41, 43, 44.

6 *Legg*, 8 Mass. 99, 101; *Kirtzinger*, 2 Ashm. 455, 463; *Stewart M. & D.* § 445. Divorce *a mensa* has no effect: *Ames v. Chew*, 5 Met. 320, 324; *Lewis v. Lee*, 3 Barn. & C. 201; *Stewart M. & D.* § 445.

7 *Supra*, n. 6.

8 *O'Connor v. Harris*, 81 N. C. 279, 282; *Buchingham v. Carter*, 2 Disn. 41, 43; *Holmes*, 23 Vt. 765, 763; *Stewart M. & D.* § 465.

9 *Stewart M. & D.* § 465.

10 *Chappelle v. Olney*, 1 Sawy. 401, 409; *Rice v. McReynolds*, 8 Lea, 39, 40; *Ware*, 23 Gratt. 670, 672; *Stewart M. & D.* §§ 460, 465.

11 *Hayward*, 30 Pick. 517, 522; *infra*, n. 13.

12 *Boozar v. Addison*, 2 Rich. Eq. 273, 279; 46 Am. Dec. 43; *infra*, n. 13.

13 *Coffin*, 2 P. Wms. 497; *Howell v. Maine*, 3 Lev. 403; *Scawen v. Blunt*, 7 Ves. 294; *Fleet v. Perrins*, Law R. 3 Q. B. 536, 541; 4 Q. B. 500; *McDaniel v. Whitman*, 16 Ala. 343; *Puryear*, 12 Ala. 13; *Lenderman*, 1 Houst. 523, 524; *Chappell v. Causey*, 11 Ga. 25; *Miller*, 1 Marsh. J. J. 169; *Brown v. Langford*, 3 Bibb. 497; *Pike v. Collins*, 33 Me. 38, 43; *Bond v. Conway*, 11 Md. 512; *Hayward*, 20 Pick. 517, 522; *Burleigh*, 22 N. H. 118; *Snowhill*, 2 N. J. Eq. 30; *Orphan v. Strain*, 2 Bradf. 34, 41; *Revel*, 2 Dev. & B. 272; *Curry v. Fulkerson*, 14 Ohio, 100; *Needles*, 7 Ohio St. 432; *Tritt v. Colwell*, 31 Pa. St. 223; *Lodge v. Hamilton*, 2 Serg. & R. 491, 493; *Boozar v. Addison*, 2 Rich. Eq. 273, 279; 46 Am. Dec. 43; *Richardson v. Daggett*, 4 Vt. 336, 344; *supra*, n. 10.

14 *Grebill*, 87 Pa. St. 105, 103; *Upshaw*, 2 Hen. & M. 331; 3 Am. Dec. 622.

15 *Post*, § 181.

16 *Post*, § 182.

17 *Post*, § 180.

18 See *Needles*, 7 Ohio St. 432, 433, 439; *Dold v. Geiger*, 2 Gratt. 93, 110; *post*, §§ 177-183.

19 *Post*, §§ 177-183.

20 *Barton*, 32 Md. 212, 224, 225. Discussed *post*, §§ 229, 230.

21 Skinner, 5 Pa. St. 232, 263. See Sherrington v. Yates, 12 Mees. & W. 855, 864; Mitford, 9 Ves. 87.

22 This has been differently decided in different States: *Post*, § 177.

23 *Ante*, §§ 22, 165.

24 *Dodgson v. Bell*, 3 Eng. L. & Eq. 542, 546.

# ARTICLE IV.—REDUCTION TO POSSESSION.

§ 177. How far a personal right.

§ 178. The intention and the act.

§ 179. Getting possession or receiving payment.

§ 180. Substitution.

§ 181. Assignment.

§ 182. Release.

§ 183. Suit.

§ 177. How far the right to reduce is a mere personal right.—The right to reduce is said to be personal with the husband,<sup>1</sup> and therefore the guardian of a lunatic husband was held incapable of exercising his right for him;<sup>2</sup> and the right was formerly not assignable,<sup>3</sup> and in many States the husband's creditors could neither compel him to reduce,<sup>4</sup> nor acquire any rights in the *choses in action*;<sup>5</sup> still in other States the contrary is held as to creditors,<sup>6</sup> and an infant's guardian was allowed to reduce,<sup>7</sup> and money paid into court for a lunatic was held a reduction,<sup>8</sup> and the right to reduce is now generally assignable;<sup>9</sup> so that rules applicable in all States cannot be laid down. In New Hampshire, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, and Vermont, the husband's creditors have no rights in his wife's *choses in action*;<sup>10</sup> in Delaware, Maryland, Massachusetts, Missouri, and Virginia they have.<sup>11</sup>

1 *Andover v. Merrimack*, 37 N. H. 437, 444; *Perry v. Wheelock*, 49 Vt. 63, 67.

2 *Andover v. Merrimack*, 37 N. H. 437, 444.

3 *Post*, § 181.

4 *Gallego*, 2 Brock. 285, 287, 291; *infra*, n. 5.



5 Gallego, 2 Brock. 235, 287; Coffin v. Morrill, 22 N. H. 352, 356, 357; Poor v. Hazleton, 15 N. H. 564, 567, 569; Wheeler v. Moore, 13 N. H. 473, 481; Marston v. Carter, 12 N. H. 159, 165; Bryan v. Spruill, 4 Jones Eq. 27, 28; McVaugh, 10 Phila. 457, 459; Dennison v. Nigh, 2 Watts, 90; Timbers v. Katz, 6 Watts & S. 290, 299; Mellinger v. Bausman, 45 Pa. St. 522, 528; Stoner v. Com. 16 Pa. St. 387, 392; Skinner, 5 Pa. St. 262, 263; Arnold v. Ruggles, 1 R. I. 165, 175; Godbold v. Boss, 12 Rich. 202; Harris v. Taylor, 3 Sneed, 536, 540; Snowden v. Lindsley, 6 Cold. 122, 126; Short v. Moore, 10 Vt. 446; Probate v. Niles, 32 Vt. 775, 778, 779; Perry v. Wheelock, 49 Vt. 63, 67.

6 Johnson v. Fleetwood, 1 Har. (Del.) 442; Babb v. Elliott, 4 Har. (Del.) 466; Peacock v. Pembroke, 4 Md. 280, 282; State v. Krebs, 6 Har. & J. 31, 38; Wheeler v. Bowen, 20 Pick. 563, 567; Holbrook v. Waters, 19 Pick. 354, 355; Alexander v. Crittenden, 4 Allen, 342, 343; Strong v. Smith, 1 Met. 476; Hockaday v. Sallee, 26 Mo. 219, 220, 221; Ware, 28 Gratt. 670, 673; Yerby v. Lynch, 3 Gratt. 439, 474, 477.

7 Ware, 28 Gratt. 670, 673.

8 Jenkins, 5 Russ. 183, 187.

9 Post, § 181.

10 Cases *supra*, n. 5.

11 Cases *supra*, n. 6.

## § 178. The intention and the act requisite to a reduction.

—It is thus<sup>1</sup> a matter of personal choice with a husband whether he will reduce his wife's choses in action to possession,<sup>2</sup> and therefore though he get possession of her property it is a question of intent whether it is or is not reduced to his possession.<sup>3</sup> He may get possession as administrator, agent, or trustee,<sup>4</sup> but to reduce he must take possession as husband.<sup>5</sup> Still whenever he does take possession he is presumed to do so as husband, and the burden of proof lies on the party negating reduction,<sup>6</sup> just as any property in the possession of the husband or wife is presumed to belong to the husband.<sup>7</sup> But intention to reduce is not enough, as long as the property if a chattel is adversely held,<sup>8</sup> or if incorporeal stands in the wife's name,<sup>9</sup> there is no reduction—the intention must be accompanied by acts.<sup>10</sup> The most usual modes of reducing choses in action to possession are:<sup>11</sup> (1) by getting possession of a chattel or receiving payment of a debt;<sup>12</sup> (2) by substituting the wife's chose in action for another in the husband's name;<sup>13</sup> (3) by assignment;<sup>14</sup> (4) by re-

lease;<sup>15</sup> and (5) by suit.<sup>16</sup> Reduction may be presumed from lapse of time.<sup>17</sup>

1 *Ante*, § 178. When creditors are not concerned and the husband is *sui juris* all agree to this statement.

2 *Arnold v. Ruggles*, 1 R. I. 165, 175; *ante*, § 178.

3 *Tomlinson*, 16 Ves. 413, 416; *McCampbell*, 2 Lea, 661, 663; 31 Am. Rep. 623; *Barron*, 24 Vt. 376, 392.

4 *Ante*, §§ 163, 169, 174.

5 *Barron*, 24 Vt. 376, 392. See *Machem*, 23 Ala. 374; *Standiford v. Devol*, 21 Ind. 404, 407; *Vreeland*, 15 N. J. Eq. 512; *Johnston*, 31 Pa. St. 450, 453; *ante*, § 163.

6 *Moyer*, 77 Pa. St. 482, 485.

7 *Ante*, § 119.

8 *Post*, § 179; *ante*, § 169.

9 *Post*, § 180.

10 *Blount v. Bestland*, 5 Ves. Jr. 515; *Cadwell v. Hill*, 47 N. H. 407, 410; *Buchingham v. Carter*, 2 Disn. 41, 44.

11 *Dixon*, 18 Ohio, 113, 115, 116; *Needles*, 7 Ohio St. 432, 437; *Buchingham v. Carter*, 2 Disn. 41, 45.

12 *Dixon*, 18 Ohio, 113, 115; *post*, § 179.

13 *Nicholson v. Drury*, Law R. 7 Ch. Div. 48, 55; *post*, § 180.

14 *Needles*, 7 Ohio St. 432, 444; *post*, § 181.

15 *Hore v. Becher*, 12 Sim. 465, 467; *post*, § 182.

16 *Scarpellini v. Acheson*, 7 Q. B. 864, 876; *post*, § 183.

17 *Harper v. Archer*, 28 Miss. 212, 223.

§ 179. Reduction by taking possession of a chattel or collecting a debt.—If a husband, as husband,<sup>1</sup> gets actual possession of a chattel of his wife's which had been held adversely,<sup>2</sup> or if debts due her are paid,<sup>3</sup> such chattel or money are choses in possession and absolutely his.<sup>4</sup> But collection of dividends is not a reduction of stock.<sup>5</sup> Her receipt, except as his agent in fact, is valueless.<sup>6</sup> Receipt of part is not reduction of whole.<sup>7</sup>

1 *Ante*, § 178.

2 *McNeill v. Arnold*, 17 Ark. 154, 171.

3 *Turton*, 6 Md. 375, 381; *Rees v. Keith*, 11 Sim. 388, 390. See *Johnson*, 33 Ala. 284; *Chase v. Palmer*, 25 Me. 341; *Latourette v. Williams*, 1 Barb. 9; *Hill v. Royce*, 17 Vt. 190.

4 *Ante*, § 170.

5 *Hart v. Stevens*, 6 Q. B. 937; *Burr v. Sherwood*, 3 Bradf. 85.

6 *Thrasher v. Tuttle*, 22 Me. 335; *Phillips v. Com.* 18 Pa. St. 116.

7 *Blount v. Bestland*, 5 Ves. 515; *Harper v. Archer*, 28 Miss. 212.

§ 180. **Reduction by substitution.**—A husband may reduce his wife's choses in action by substituting for them other securities in his own name.<sup>1</sup> Thus, it is a reduction of his wife's note when he gets a judgment on it in his own name;<sup>2</sup> so, it is of her shares of stock if he transfers them in his own name.<sup>3</sup> Taking the new security in their joint names does not deprive her of her right of survivorship,<sup>4</sup> unless it appears that such was his intent.<sup>5</sup> So if he takes something else instead of payment of a debt, intending to appropriate it to his own use.<sup>6</sup> So an award to him on a claim is a reduction,<sup>7</sup> but not an unfinished compromise.<sup>8</sup>

1 Needles, 7 Ohio St. 422, 437; *Lassiter v. Turner*, 2 Yerg. 413.

2 *Scarpellini v. Acheson*, 7 Q. B. 864, 876; *Henderson v. Guyot*, 6 Smedes & M. 209; *Dixon*, 18 Ohio, 113, 115, 116; *post*, § 183.

3 *Winslow v. Crocker*, 17 Me. 29, 31; *infra*, n. 4.

4 *Nicholson v. Drury*, Law R. 7 Ch. D. 48, 55; *Shuttleworth v. Greaves*, 2 Jur. 957; *Blount v. Bestland*, 5 Ves. Jr. 515; *Wall v. Tomlinson*, 16 Ves. 413, 416; *Slaymaker v. Bank*, 10 Pa. St. 373; *Arnold v. Ruggles*, 1 R. I. 165, 178.

5 Compare *ante*, §§ 127-129.

6 See *Goodwyn*, Yel. 476; *Howman v. Corig*, 2 Vern. 190; *Burnham v. Bennett*, 2 Colly. C. C. 254; *Howard v. Bryant* 9 Gray, 239, 240; *Rogers v. Bumpass*, 4 Fred. Eq. 385; *Needles*, 7 Ohio St. 432; *Stewart*, 3 Watts & S. 476; *Yerby v. Lynch*, 3 Gratt. 460.

7 *Oglander v. Boston*, 1 Vern. 396.

8 *Macaulay v. Phillips*, 4 Ves. 15.

§ 181. **Reduction by assignment.**—At common law a chose in action could not be assigned,<sup>1</sup> but in equity such an assignment if on valuable consideration was enforceable;<sup>2</sup> and now by statutes choses in action are generally assignable.<sup>3</sup> And a husband may assign his choses in action,<sup>4</sup> but unless there is a valuable consideration,<sup>5</sup> his assignment will not be enforced if it is executory only,<sup>6</sup> or in equity.<sup>7</sup> His assignment in some cases is reduction, in others it conveys to the assignee only his right to reduce.<sup>8</sup> In general, an assignment of a legal chose in action immediately reducible

is a reduction by the husband.<sup>9</sup> Thus, he reduces her shares to possession, and cuts off all her rights, by placing them in another's name.<sup>10</sup> So her negotiable paper is reduced by indorsement.<sup>11</sup> He can transfer her note by his sole indorsement;<sup>12</sup> she cannot indorse at all,<sup>13</sup> except as his agent in fact;<sup>14</sup> her joinder with him is permissible,<sup>15</sup> but adds nothing to the effect of the assignment.<sup>16</sup> So he can transfer her non-negotiable paper in his own name.<sup>17</sup> He cannot thus transfer a note to her as administratrix,<sup>18</sup> though only she or her representatives and not the maker can object.<sup>19</sup> But when a husband assigns his wife's unascertained,<sup>20</sup> contingent,<sup>21</sup> or equitable<sup>22</sup> chose in action, he does not thereby reduce it to possession, but assigns his right to reduce, and his assignee stands in his shoes,<sup>23</sup> being cut out by the dissolution of the marriage before reduction,<sup>24</sup> and holding the chose in action subject to the wife's equity.<sup>25</sup> And it is the same though the wife joins in the assignment.<sup>26</sup> A general assignment of a husband in bankruptcy,<sup>27</sup> or "of all his property,"<sup>28</sup> does not pass his wife's choses in action;<sup>29</sup> but it does if these are specified.<sup>30</sup>

1 Anson Cont. 206; *Stogdel v. Fugate*, 2 Marsh. A. K. 136.

2 Anson Cont. 208; *Mayo v. Carrington*, 13 Gratt. 124.

3 See *Broughton v. Badgett*, 1 Ga. 75; *Ford v. Hale*, 1 Mon. 23; *Lucas v. Byrne*, 35 Md. 183; *Waterman v. Frank*, 21 Mo. 108; *McPike v. McPherson*, 41 Mo. 521; *Campbell v. Mumford*, 1 Hayw. 398; *McCutchen v. Keith*, 2 Ohio, 262; *Bailey v. Rawley*, 2 Swan, 295.

4 *McCauley v. Woolf*, 42 Ala. 389, 393; *Lowry v. Houston*, 4 Miss. 394, 396; *Abington v. Travis*, 15 Mo. 240, 244; *Bryan v. Spruill*, 4 Jones Eq. 27, 28; *Needles*, 7 Ohio St. 432, 438; *Taliaferro*, 4 Call, 93, 96; *Ware*, 28 Gratt. 670, 672.

5 *Webb*, 21 Pa. St. 248, 250.

6 See *Lonsdale*, 29 Pa. St. 407; *Harwood v. Fisher*, 1 Younge & C. 110.

7 *Kennedy v. Ware*, 1 Pa. St. 445; 44 Am. Dec. 145.

8 The cases on this topic are irreconcilable.

9 *Widgery v. Tepper*, Law R. 7 Ch. D. 423, 426; *Needles*, 7 Ohio St. 432, 441.

10 *Winslow v. Crocker*, 17 Me. 23, 21. Compare *ante*, § 180.

11 *Searpellini v. Acheson*, 7 Q. B. 834, 876; *Gaters v. Maddeley*, 6 Mees. & W. 423; *McNeillage v. Holloway*, 1 Barn. & Ald. 218; *Sherrington v. Yates*, 12 Mees. & W. 855, 864; *Droper v. Jackson*, 16 Mass. 480; *Richardson v. Daggett*, 4 Vt. 336; cases *infra*.

12 *Mason v. Morgan*, 2 Ad. & E. 30, 32; *Tryon v. Sutton*, 13 Cal. 490, 493; *Evans v. Seerest*, 3 Ind. 545; *Holland v. Moody*, 12 Ind. 170; *Page v. Estes*, 19 Pick. 260, 272; *Henningway v. Matthews*, 10 Tex. 207, 208.

13 *Henningway v. Matthews*, 10 Tex. 207, 208.

14 *Searpellini v. Acheson*, 7 Q. B. 864, 876; *Turpin v. Thompson*, 2 Met. (Ky.) 420; *Savage v. King*, 17 Me. 301; *Stevens v. Beale*, 10 Cush. 291, 292, 293; *McClain v. Weidemeyer*, 25 Mo. 364; *George v. Cutting*, 46 N. H. 130; *Lee v. Satterlee*, 1 Rob. (N. Y.) 1.

15 *Tryon v. Sutton*, 13 Cal. 490, 493.

16 *Prole v. Soady*, Law R. 3 Ch. App. 220, 222; *Hord*, 5 Mon. B. 81, 85; *Norris v. Lantz*, 18 Md. 260; *Scott v. Hix*, 2 Sneed, 192, 194; *post*, § 181.

17 *Evans v. Seerest*, 3 Ind. 545.

18 *Ante*, § 167.

19 *Roberts v. Place*, 18 N. H. 183, 185.

20 *Harper v. Archer*, 28 Miss. 212, 219.

21 *Matheney v. Guess*, 2 Hill Ch. 63, 66.

22 *Dold v. Geiger*, 2 Gratt. 98, 110.

23 *Tidd v. Lister*, 3 DeGex M. & G. 857, 864; *Mickelmore v. Mudge*, 2 Giff. 183, 184; *Ashby*, 1 Colly. C. C. 519, 554; *Scott v. Spashett*, 3 Maen. & G. 599, 603, 604; *Prole v. Soady*, Law R. 3 Ch. App. 220, 222; *Box*, 6 Irish Eq. 174, 195; *Rogers v. Acastar*, 14 Beav. 445, 450; *George v. Goldsby*, 23 Ala. 326; *State v. Robertson*, 5 Har. (Del.) 201; *Smith v. Alwood*, 14 Ga. 402, 413; *Lynn v. Bradley*, 1 Met. (Ky.) 232, 235; *Page v. Estes*, 19 Pick. 260, 271; *Van Epps v. Van Deusen*, 4 Paige, 64, 73; 25 Am. Dec. 516; *O'Connor v. Harris*, 81 N. C. 279, 282; *Needles*, 7 Ohio St. 432, 438, 439; *Duke v. Palmer*, 10 Rich. Eq. 380; *Bugg v. Franklin*, 4 Sneed, 120; *Rice v. McReynolds*, 8 Lea, 36, 39; *Browning v. Headley*, 2 Rob. (Va.) 340, 368; 40 Am. Dec. 755. That he can dispose absolutely of such, see *Tuttle v. Fowler*, 22 Conn. 58, 64, 66; *Smilie*, 22 Pa. St. 130, 133; *Webb*, 21 Pa. St. 248, 250.

24 *Lynn v. Bradley*, 1 Met. (Ky.) 232, 235; *Outcalt v. Van Winkle*, 2 N. J. Eq. 513, 516; *Van Epps v. Van Deusen*, 4 Paige, 64, 73; 25 Am. Dec. 516; *Bryan v. Spruill*, 4 Jones Eq. 27, 28; *Needles*, 7 Ohio St. 432, 440.

25 *Moore*, 14 Mon. B. 259, 261; *Kenny v. Udall*, 5 Johns. Ch. 464, 473; *Dold v. Geiger*, 2 Gratt. 98, 110.

26 Cases *supra*, n. 16.

27 *Sherrington v. Yates*, 12 Mees. & W. 855, 864; *Williams v. Swan*, 75 Va. 137, 144; *infra*, n. 29.

28 *Skinner*, 5 Pa. St. 262, 263.

29 See also *Mitford*, 9 Ves. 87; *Poor v. Hazleton*, 15 N. H. 564, 565.

30 *Outcalt v. Van Winkle*, 2 N. J. Eq. 513, 516; *Van Epps v. Van Deusen*, 4 Paige, 64, 73, 74; 25 Am. Dec. 516.

§ 182. **Reduction by release.**—A husband may release his wife's choses in action, and thus destroy all her

rights;<sup>1</sup> but he cannot release when there is no right of action.<sup>2</sup> Thus he can release a legacy to her,<sup>3</sup> but not a promise to her to pay her money after his death;<sup>4</sup> whether he can release an annuity to her is doubtful.<sup>5</sup> A release is strictly an instrument under seal.<sup>6</sup> A parol release must have a valuable consideration.<sup>7</sup>

1 *Hore v. Becher*, 12 Sim. 465, 467; *Jacks v. Adair*, 31 Ark. 616, 623; *Fitch v. Ayer*, 2 Conn. 143; *Griswold v. Penniman*, 2 Conn. 764; *Mansion v. Tittsworth*, 18 Mon. B. 582, 602; *Thomas v. Kelsoe*, 7 Mon. 521; *Chase v. Palmer*, 25 Me. 341; *Weems*, 19 Md. 334, 344; *Thomas v. Wood*, 1 Md. Ch. 296; *Com. v. Manley*, 12 Pick. 173; *Foster v. Fifield*, 20 Pick. 67; *Duncan v. Prentice*, 4 Met. 216; *McGee v. Ford*, 13 Miss. 769; *Morton v. Massie*, 3 Mo. 482; *Tucker v. Gordon*, 6 N. H. 564; *Johnson v. Bennett*, 39 Barb. 237; *Hearne v. Keran*, 2 Ired. Eq. 39; *Barnes v. Pearson*, 6 Ired. Eq. 482; *Lassiter v. Dawson*, 2 Dev. Eq. 383; *Needles*, 7 Ohio St. 432, 442; *Brinton*, 10 Pa. St. 408; *Krause v. Beitel*, 3 Rawle, 199; 23 Am. Dec. 113.

2 *Rogers v. Acastar*, 14 Beav. 445, 450; *Needles*, 7 Ohio St. 432, 442.

3 *Jacks v. Adair*, 31 Ark. 616, 623; *Weems*, 19 Md. 334, 344.

4 *Rogers v. Acastar*, 14 Beav. 445, 450.

5 *Pro. Hore v. Becher*, 12 Sim. 465, 467. *Contra*, *Thompson v. Butler*, Sir F. Moore, 522.

6 See *Palmer v. Green*, 6 Conn. 14; *Learned v. Bellows*, 8 Vt. 79.

7 *Webb*, 21 Pa. St. 248, 250.

§ 183. **Reduction by suit.**—Whenever a suit is necessary to get possession of property, such property is a chose in action,<sup>1</sup> which is reduced to possession by the husband only if he gets actual possession of it.<sup>2</sup> As where he replevied her chattel,<sup>3</sup> or gets a judgment for it in his own name.<sup>4</sup> Obtaining judgment in his own name is reduction by substitution,<sup>5</sup> but there is no reduction if such judgment were gotten by him for her as her agent or trustee.<sup>6</sup> Nor is a judgment in their joint names a reduction to possession.<sup>7</sup> In what cases he must sue alone, and in what cases he may or must join her, is discussed under “Hawes on Parties.”<sup>8</sup>

1 *Hall v. McLain*, 11 Humph. 425, 428.

2 *Ante*, § 179.

3 *McNeil v. Arnold*, 17 Ark. 154, 171.

4 Scarpellini v. Acheson, 7 Q. B. 864, 876; Heygate v. Annesley, 3 Bro. C. C. 362; Mason v. McNeill, 23 Ala. 201, 208; Fischer v. Hess, 9 Mon. B. 614, 617; Henderson v. Guyot, 6 Smedes & M. 209; Dixon, 13 Ohio, 113, 115, 116; Needles, 7 Ohio, 432, 437; Boozer v. Addison, 2 Rich. Eq. 273; 46 Am. Dec. 43.

5 *Ante*, § 180.

6 Pierson v. Smith, 9 Ohio St. 554, 557.

7 Mason v. McNeill, 23 Ala. 201, 208; Pike v. Collins, 33 Me. 38, 43; Buckingham v. Carter, 2 Disn. 41, 44; Perry v. Wheelock, 49 Vt. 63, 67.

8 Hawes Parties, §§ 63-70.

## CHAPTER XI.

### WIFE'S ESTATE IN HER OWN PROPERTY.

ART. I. GENERALLY, §§ 184, 185.

II. WIFE'S PARAPHERNALIA AND PIN-MONEY,  
§§ 186-189.

III. WIFE'S EQUITY TO A SETTLEMENT, §§ 190-196.

#### ARTICLE I. — GENERALLY.

§ 184. Wife's general property.

§ 185. Wife's separate property.

§ 184. *Wife's general property.* — By the common law the individuality of the wife is merged in that of her husband,<sup>1</sup> she had no separate legal existence,<sup>2</sup> and during coverture could not hold property or exercise property rights.<sup>3</sup> Through marriage by operation of law all her personalty in possession passed absolutely to her husband,<sup>4</sup> he acquired a right to reduce her *choses in action* to possession, and thus make them his own,<sup>5</sup> of her chattels real he became practically absolute owner,<sup>6</sup> and he was entitled to all the rents and profits of her real estate.<sup>7</sup> She could not acquire property without his consent.<sup>8</sup> And in any acquisitions of hers he had the same rights as he had in her property owned by her at the time of her marriage.<sup>9</sup> But from the earliest times courts of equity encroached on this simple and savage system,<sup>10</sup> and statutes have now more or less abolished it in every State where the common law has been in force.<sup>11</sup>

1 Barron, 24 Vt. 375, 398; *ante*, § 38.

2 O'Ferrall v. Simplot, 4 Iowa, 381, 389.

3 As to MARRIED WOMEN'S CAPACITY, see *post*, Part iv. §§ 331, *et seq.*

4 Cram v. Dudley, 28 N. H. 537, 541; *ante*, § 170.

5 Cox v. Scott, 9 Baxt. 305, 310; *ante*, § 176.



- 6 Allen v. Hooper, 50 Me. 371, 374; *ante*, § 145.
- 7 Lucas v. Rickerick, 1 Lea, 726, 728; *ante*, § 147.
- 8 Patterson v. Robinson, 25 Pa. St. 81, 82; *post*, § 223.
- 9 See Campbell v. Galbreath, 12 Bush, 459, 464; *supra*, notes, 4, 7.
- 10 2 Story Eq. Jur. § 1378; 1 Fonb. B. C. 1, ch. 2, § 6, n.; *post*, § 197.
- 11 For summary, see 6 South. Law Rev. p. 633; *post*, § 217.

§ 185. **Wife's separate property.**—Besides her paraphernalia, pin-money, and equity to a settlement discussed in this chapter, a wife may have separate property created by settlement or by statute, discussed in chapters xii. and xiii.

## ARTICLE II.—PARAPHERNALIA AND PIN-MONEY.

- § 186. Paraphernalia defined.
- § 187. Incidents of paraphernalia.
- § 188. Pin-money defined.
- § 189. Incidents of pin-money.

§ 186. **Paraphernalia defined.**—By the common law a wife's paraphernalia were such articles of wearing apparel,<sup>1</sup> including jewels and ornaments,<sup>2</sup> as well as necessary clothing,<sup>3</sup> consistent with her condition and degree,<sup>4</sup> which her husband allowed her to wear.<sup>5</sup> Thus, a watch bought by her husband for her was a part of her paraphernalia,<sup>6</sup> but not if such watch were out of keeping with their station in life.<sup>7</sup> So the jewels, worth three thousand pounds, of a peeress, were so held.<sup>8</sup> But paraphernalia included only articles which she wore,<sup>9</sup> plate for family use,<sup>10</sup> or ornaments for the parlor,<sup>11</sup> though given to her were not paraphernalia. Her paraphernalia did not include, and must be distinguished from her sole and separate property secured to her by equity,<sup>12</sup> or by statute.<sup>13</sup> So they must be distinguished from paraphernal property under the civil law;<sup>14</sup> the latter is the wife's extra-dotal separate property, which she can manage alone during cover-

ture;<sup>15</sup> the former belong to the husband during his life, but pass to her on his death,<sup>16</sup> in addition to her dower,<sup>17</sup> and thirds.<sup>18</sup> Jewels, etc., which are heir-looms are not paraphernalia, though given to the wife to wear.<sup>19</sup>

1 *Seymore v. Tresilian*, 3 Atk. 358, 359; *Hawkins v. Providence*, 119 Mass. 596, 599; 20 Am. Rep. 353; *McCormick v. Pennsylvania*, 49 N. Y. 303, 317.

2 *Howard v. Menifee*, 5 Ark. 668, 670; *Tlexan v. Wilson*, 43 Me. 186, 190; *McCormick v. Pennsylvania*, 49 N. Y. 303, 317.

3 1 Rolle, 911, L. 35; 2 Blackst. Com. 436; *Townshend v. Windham*, 2 Ves. 1, 7.

4 *Vass v. Southall*, 4 Ired. 301, 303.

5 See 2 Blackst. Com. 435, 436; *Willson v. Pack*, Prec. Ch. 295, 297; *Northey*, 2 Atk. 77, 79; *Ridout v. Plymouth*, 2 Atk. 104, 105; *Marshall v. Blew*, 2 Atk. 217; *Snelson v. Corbet*, 3 Atk. 358, 359; *Graham v. Londonderry*, 3 Atk. 393, 394; *Grant*, 2 Story, 312, 319; *Puryear*, 12 Ala. 13, 15; *Howard v. Menifee*, 5 Ark. 668, 670; *State v. Hays*, 21 Ind. 283, 289; *Tlexan v. Wilson*, 43 Me. 186, 190; *Carroll v. Lee*, 3 Gill & J. 504, 509; *Hawkins v. Providence*, 119 Mass. 596, 599; 20 Am. Rep. 353; *Gully v. Hull*, 31 Miss. 20; *Harrall*, 31 N. J. Eq. 101, 102; *Rawson v. Pennsylvania*, 48 N. Y. 212, 216; 8 Am. Rep. 543; *McCormick v. Pennsylvania*, 49 N. Y. 303, 317; *Vass v. Southall*, 4 Ired. 295, 297.

6 *Howard v. Menifee*, 5 Ark. 668, 671; *Tlexan v. Wilson*, 43 Me. 186, 190.

7 *Vass v. Southall*, 4 Ired. 295, 297.

8 *Northey*, 2 Atk. 77, 79.

9 *Seymore v. Tresilian*, 3 Atk. 358, 359.

10 *Carroll v. Lee*, 3 Gill & J. 504, 509.

11 *Graham v. Londonderry*, 3 Atk. 393, 394.

12 *Graham v. Londonderry*, 3 Atk. 393, 394; *Gully v. Hull*, 31 Mass. 20; 1 Bish. M. W. § 220; *post*, §§ 197-216.

13 *Rawson v. Pennsylvania*, 48 N. Y. 212, 216; 8 Am. Rep. 543.

14 See La. Civ. Code, 1875, §§ 2315, 2317-2332, 2360-2369.

15 *Cambre v. Grobent*, 33 La. An. 246, 247, 248; *Guilbeau v. Cornier*, 2 La. 6, 8.

16 *Howard v. Menifee*, 5 Ark. 668, 671; *post*, § 187.

17 Discussed *Stewart M. & D.* §§ 460, 461; *post*, §§ 244-300.

18 Discussed *Stewart M. & D.* §§ 460, 462; *post*, § 301.

19 *Calmady*, 11 Vin. Abr. 181, 182; *Jervoise*, 17 Beav. 566, 570, 571; *Berry*, 6 Irish Ch. 497.

§ 187. **Incidents of paraphernalia.**—Although a husband is bound to supply his wife with necessary food, shelter, and clothing,<sup>1</sup> and would not be allowed "to leave her naked and exposed to shame and cold,"<sup>2</sup> the

very gown on her back is his;<sup>3</sup> all personalty in her possession is absolutely his.<sup>4</sup> So he can dispose of her paraphernalia during his life;<sup>5</sup> if any of them are stolen the indictment must charge a larceny of *his* goods,<sup>6</sup> if injured or taken away the suit must be in *his* name.<sup>7</sup> But in this paraphernalia differ from other personalty: if he dies without having disposed of them they are his wife's absolutely against every one except creditors;<sup>8</sup> he cannot will them;<sup>9</sup> if he has pledged them she can make his estate redeem them;<sup>10</sup> they may, it is true, be taken by his creditors,<sup>11</sup> except articles of necessary wearing apparel<sup>12</sup>—which include something more than one gown<sup>13</sup>—and such articles, perhaps, as her wedding ring,<sup>14</sup> etc., but if taken she may compel his estate to reimburse her.<sup>15</sup> Paraphernalia are therefore property of a widow rather than of a wife, and are now generally secured to the widow by statute.<sup>16</sup> In one case a statute validating gifts from husband to wife was held to render the wife's paraphernalia sole and separate property.<sup>17</sup>

1 *Ante*, § 61; Stewart M. & D. §§ 179, 180.

2 1 Rolle, 911, L. 35.

3 *Carre v. Brice*, 7 Mees. & W. 183, 184; *Regina v. Tollett*, Car. & M. 112, 118, 119.

4 *Cox v. Scott*, 9 Baxt. 305, 310; *ante*, §§ 167, 170.

5 *Seymore v. Tresilian*, 3 Atk. 353, 359; *Howard v. Menifee*, 5 Ark. 668, 671; *Tlexan v. Wilson*, 43 Me. 186, 190; *Rawson v. Pennsylvania*, 48 N. Y. 212, 215; 8 Am. Rep. 543.

6 *State v. Hays*, 21 Ind. 288, 289.

7 *Hawkins v. Providence*, 119 Mass. 596, 599; 20 Am. Rep. 353; *Rawson v. Pennsylvania*, 48 N. Y. 212, 215; 8 Am. Rep. 543; *McCormick v. Pennsylvania*, 49 N. Y. 303, 317.

8 *Rawson v. Pennsylvania*, 48 N. Y. 212, 215; 8 Am. Rep. 543; *infra*, n. 9. See *Hewson*, 23 Eng. L. & Eq. 283.

9 *Northey*, 2 Atk. 77, 79; *Marshall v. Blew*, 2 Atk. 217; *Howard v. Menifee*, 5 Ark. 668, 671; *Rawson v. Pennsylvania*, 48 N. Y. 212, 215; 8 Am. Rep. 543.

10 *Graham v. Londonderry*, 3 Atk. 393, 395; *Harrall*, 31 N. J. Eq. 101, 102, 103.

11 *Willson v. Pack*, Prec. Ch. 296, 297; *Ridout v. Plymouth*, 2 Atk. 104, 105; *Grant*, 2 Story. 312, 319; *Howard v. Menifee*, 5 Ark. 668, 671; *Tlexan v. Wilson*, 43 Me. 186, 190.

- 12 2 Blackst. Com. 455, 456.
- 13 Townshend v. Windham, 2 Ves. 1, 7.
- 14 1 Bish. M. & W. § 218.
- 15 Snelson v. Corbet, 3 Atk. 353, 355; Howard v. Menlfee, 5 Ark. 668, 671.
- 16 See "Widow's Allowance," Stewart M. & D. § 459.
- 17 Rawson v. Pennsylvania, 48 N. Y. 212, 216; 8 Am. Rep. 543.

§ 188. **Pin-money defined.**—It is said that the books contain no definition of pin-money.<sup>1</sup> It is simply a husband's allowance to his wife for her dress and personal expenses.<sup>2</sup> Sometimes it is created by a settlement,<sup>3</sup> and is definite in amount,<sup>4</sup> and specific in purpose;<sup>5</sup> sometimes it takes the form of a gift to the wife of her savings out of the household expenses,<sup>6</sup> or the profits of a dairy or hennery.<sup>7</sup> It has been recognized in Maryland,<sup>8</sup> but rejected in North Carolina.<sup>9</sup>

- 1 Howard v. Digby, 8 Bligh N. R. 224, 259, 260; 2 Clark & F. 634, 654.
- 2 Compare 1 Bish. M. W. § 230. See Jodrell, 9 Beav. 45; 2 Story Eq. Juris. § 1375; Macq. H. & W. 318; Peachey Mar. Sett. 298.
- 3 Beard, 3 Atk. 72; Bell H. & W. 466.
- 4 Howard v. Digby, 8 Bligh N. R. 224, 269; 2 Clark & F. 634, 654.
- 5 Powell v. Hankey, 2 P. Wms. 84.
- 6 Slanning v. Style, 3 P. Wms. 337; Stamway v. Stiles, 2 Eq. Cas. Abr. 156; Calmady, 11 Vin. Abr. 181; Mangey v. Hungerford, 2 Eq. Cas. Abr. 156. But see Tyrell, 2 Freem. 304.
- 7 Slanning v. Style, 3 P. Wms. 337.
- 8 Miller v. Williamson, 5 Md. 219.
- 9 McKinnon v. McDonald, 4 Jones Eq. 1, 6.

§ 189. **Incidents of pin-money.**—Pin-money is the wife's sole and separate property, and she has all the incidents thereof,<sup>1</sup> save that more than one year's arrears cannot be collected.<sup>2</sup> It is generally secured to a married woman by a settlement,<sup>3</sup> which if made after marriage must not prejudice the rights of her husband's creditors.<sup>4</sup> It is enforced in equity.<sup>5</sup> She may contract with respect thereto as with respect to her other equitable separate estate.<sup>6</sup> Accumulations thereof are hers to dispose of by will.<sup>7</sup> She does not forfeit it

by elopement,<sup>8</sup> though she may waive it (arrears) by accepting from her husband apparel, etc.,<sup>9</sup> or a legacy,<sup>10</sup> in its stead. After his death she can claim only one year's arrears,<sup>11</sup> and if she dies her representatives cannot claim any arrears;<sup>12</sup> she can claim all arrears, however, if she has demanded payment,<sup>13</sup> or has been living apart from her husband.<sup>14</sup>

1 See *Howard v. Digby*, 2 Clark & F. 654; 8 Bligh N. R. 224, 269.

2 *Howard v. Digby*, 8 Bligh N. R. 224, 246.

3 *Stewart M. & D.* §§ 32-43; *ante*, §§ 99, *et seq.*

4 *Beard*, 3 Atk. 72; *Bell H. & W.* 466; *ante*, §§ 113, 118.

5 2 Story Eq. Jur. § 1375 *a*, note; *Slanning v. Style*, 3 P. Wms. 337, 338.

6 *Howard v. Digby*, *supra*, n. 1.

7 *Sugden Law of Prop.* p. 163; *Neal*, Prec. Ch. 44. *Contra*, *Bar-rack v. McCulloch*, 3 Kay & J. 114.

8 *Blount v. Winter*, 3 P. Wms. 276, n.; *Field v. Serres*, 1 N. R. 121; *Moore*, 1 Atk. 272; *Sidney*, 3 P. Wms. 269; *Lee*, Dick. 321; *More v. Scarborough*, 2 Eq. Cas. Abr. 156.

9 *Powell v. Hankey*, 2 P. Wms. 84; *Thomas v. Bennet*, 2 P. Wms. 341; *Fowler*, 3 P. Wms. 355.

10 *Arthur*, 11 Ired. Eq. 511; *Fowler*, 3 P. Wms. 355.

11 *Howard v. Digby*, 8 Bligh N. R. 224, 246; 2 Clark & F. 634; *Aston*, 1 Ves. Sr. 267; *Townshend v. Windham*, 2 Ves. 7; *Peacock v. Monk*, 2 Ves. Sr. 200; *Osley*, Prec. Ch. 26; *Warwick v. Edwards*, 1 Eq. Abr. 140; *Peachey Mar. Sett.* 303.

12 *Howard v. Digby*, 8 Bligh N. R. 224, 271.

13 *Ridout v. Lewis*, 1 Atk. 269; *Aston*, 1 Ves. Sr. 267.

14 *Aston*, 1 Ves. Sr. 267.

### ARTICLE III.—WIFE'S EQUITY TO A SETTLEMENT.

§ 190. Definition.

§ 191. By what court enforced.

§ 192. On whose application enforced.

§ 193. Out of what property enforced.

§ 194. Under what circumstances enforced.

§ 195. On whom the settlement is made.

§ 196. Amount of the settlement.

§ 190. *Wife's equity defined.*—A wife's equity to a settlement is her right enforceable in equity to have a settlement for the benefit of herself and her children

out of her equitable choses in action.<sup>1</sup> This settlement may be made (1) by a court of equity;<sup>2</sup> (2) *sua sponte*, or on application of a trustee, or of the husband, or of the wife;<sup>3</sup> (3) out of any fund over which it has jurisdiction;<sup>4</sup> (4) whenever the wife needs it, and against her husband's creditors and assignees, unless she has waived it;<sup>5</sup> (5) on the wife alone or on her and her children;<sup>6</sup> (6) the amount depending on the special circumstances of each particular case.<sup>7</sup> It originated in the chancery courts of England,<sup>8</sup> growing out of the maxim that "he who seeks equity must do equity," and being at first recognized only when the husband or his assignee went into equity to collect a chose in action of the wife's.<sup>10</sup> It has been enforced in most of the United States,<sup>11</sup> but not in all;<sup>12</sup> and has been superseded by married women's separate property acts which have nearly universally destroyed the husband's rights in his wife's choses in action.<sup>13</sup> It is a valuable right and valuable consideration for a settlement by a husband,<sup>14</sup> and paramount to the right of the husband's creditors<sup>15</sup> or assigns.<sup>16</sup>

1 See *Jewson v. Moulson*, 2 Atk. 417, 419; *Sturgis v. Champneys*, 5 Mylne & C. 92, 101, 105; *Wiles*, 3 Md. 1, 9; 56 Am. Dec. 733; *Durr v. Boyer*, 2 McCord, 368, 372; 1 White & T. Lead. Cas. 424, 360. It is hard to define as it depends very much on the practice of the courts: *Kenny v. Udall*, 5 Johns. Ch. 463, 474; 2 Perry Trusts, § 627.

2 *Sturgis v. Champneys*, 5 Mylne & C. 92, 103; *post*, § 191.

3 *Elibank v. Montolieu*, 5 Ves. 737, 743; 1 White & T. Lead. Cas. 424, 623, 628; *post*, § 192.

4 *Sturgis v. Champneys*, 5 Mylne & C. 92, 103; *Wiles*, 3 Md. 1, 9; 56 Am. Dec. 733; *post*, § 193.

5 *Post*, § 194.

6 *Murray v. Elibank*, 13 Ves. 1, 6; *post*, § 195.

7 *Kenny v. Udall*, 5 Johns. Ch. 464, 478, 479; *post*, § 196.

8 *Murray v. Elibank*, 13 Ves. 1; 1 White & T. Lead. Cas. 360.

9 *Sturgis v. Champneys*, 5 Mylne & C. 92, 105; *Duvall v. Farmers*, 4 Gill & J. 282, 291; 23 Am. Dec. 558.

10 2 Story Eq. Jur. §§ 1408, 1414; 1 White & T. Lead. Cas. 333.

11 *Andrews v. Jones*, 10 Ala. 401, 423; *Carleton v. Banks*, 7 Ala. 34; *Bradford v. Goldsboro*, 15 Ala. 311; *Guild*, 16 Ala. 122; *Abernethy*, 8 Fla. 213; *Bell*, 1 Kelly, 637, 639, 640; *Napier v. Howard*, 3 Kelly, 193,

204; Yeldell *v.* Quarles, Dud. Eq. 55, 56; Corley, 22 Ga. 178; Pool *v.* Morris, 29 Ga. 374; Bennett *v.* Dillingham, 2 Dana, 436, 437; Thomas *v.* Kennedy, 4 Mon. B. 235, 237; Hays *v.* Blanks, 7 Mon. B. 347; Crook *v.* Turpin, 10 Mon. B. 243; Moore, 14 Mon. B. 259; Wright *v.* Arnold, 14 Mon. B. 642; Chase *v.* Palmer, 29 Me. 342, 348; Tucker *v.* Andrews, 13 Me. 124, 128; Thrasher *v.* Tuttle, 22 Me. 335; Wiles, 3 Md. 1, 9; 56 Am. Dec. 733; Taggart *v.* Thayer, 10 Md. 99; Norris *v.* Lantz, 18 Md. 260; Kuhn *v.* Stansfield, 28 Md. 210; Oswald *v.* Hoover, 43 Md. 367; McVey *v.* Praggs, 3 Md. Ch. 94; Jones, 1 Bland, 459; 18 Am. Dec. 327; Helms *v.* Franciscus, 2 Bland, 544, 576; 20 Am. Dec. 402; Duvall *v.* Farmers, 4 Gill & J. 282, 291; 23 Am. Dec. 553; Barrett *v.* Oliver, 7 Gill & J. 191; Groverman *v.* Diffenderfer, 11 Gill & J. 15, 22; Mann *v.* Higgins, 7 Gill, 266; State *v.* Reigart, 1 Gill, 1; 39 Am. Dec. 628; State *v.* Krebs, 6 Har. & J. 31; Page *v.* Estes, 19 Pick. 269, 271; Sawyer *v.* Baldwin, 20 Pick. 373; Gassett *v.* Grout, 4 Met. 486, 489; Davis *v.* Newton, 6 Met. 537, 543; Carter, 14 Smedes & M. 59; Stevenson *v.* Brown, 4 N. J. Eq. 503; Kenny *v.* Udall, 5 Johns. Ch. 464, 473-476; 3 Cowen, 591, 599-609; Schuyler *v.* Hoyle, 5 Johns. Ch. 196; Glen *v.* Fisher, 6 Johns. Ch. 33; 10 Am. Dec. 310; Van Epps *v.* Van Deusen, 4 Paige, 64; 25 Am. Dec. 516; Smith *v.* Kane, 2 Paige, 303; Rees *v.* Waters, 9 Watts, 90, 94; Gray, 1 Pa. St. 329; Goochenaure, 23 Pa. St. 460; Durr *v.* Bowyer, 2 McCord Ch. 368, 372; Myers, 1 Bail. Eq. 24, 31; Hill, 1 Strob. Eq. 2, 24; Wilkes *v.* Fitzpatrick, 1 Humph. 54, 58; Phillips *v.* Hassell, 10 Humph. 197; Browning *v.* Headley, 2 Rob. (Va.) 342, 371; 40 Am. Dec. 755; Poindexter *v.* Jeffries, 15 Gratt. 363; Short *v.* Moore, 10 Vt. 446, 451; Barron, 24 Vt. 375, 391-395.

12 Bryan, 1 Dev. Eq. 47; Lassiter *v.* Dawson, 2 Dev. Eq. 233.

13 *Ante*, § 165; 2 Perry Trusts, § 645, note.

14 Wheeler *v.* Cary, Amb. 121, 122; *ante*, § 105.

15 Hays *v.* Blanks, 7 Mon. B. 347, 348; Barron, 24 Vt. 375, 395. Superior to right of set-off: Carr *v.* Taylor, 10 Ves. 574; O'Ferrall, 1 Gill & J. 347.

16 Macaulay *v.* Phillips, 4 Ves. 19; 1 White & T. Lead. Cas. 447, 640; Kenny *v.* Udall, 5 Johns. Ch. 464, 473, 477. See also Jewson *v.* Moulson, 2 Atk. 417, 420; Burdon *v.* Dean, 2 Ves. Jr. 607; Pryor *v.* Hill, 4 Bro. Ch. 138; Sturgis *v.* Champneys, 5 Mylne & C. 97; Andrew *v.* Jones, 10 Ala. 401; Bell, 1 Kelly, 637; Moore, 14 Mon. B. 259; Crook *v.* Turpin, 10 Mon. B. 241; Norris *v.* Lantz, 18 Md. 260; Duvall *v.* Farmers, 4 Gill & J. 283; 23 Am. Dec. 558; Gassett *v.* Grout, 4 Met. 486; Davis *v.* Newton, 6 Met. 537; Page *v.* Estes, 19 Pick. 269; Durr *v.* Bowyer, 2 McCord Ch. 368; Heath, 2 Hill Ch. 100; Sherrard *v.* Carlisle, 1 Pat. & H. 12; Browning *v.* Headley, 2 Rob. (Va.) 342; 40 Am. Dec. 755.

§ 191. By what courts wife's equity is enforced.—The wife's right to a settlement out of her *choses in action* originated in the chancery courts of England,<sup>1</sup> and is enforced only by courts of equity where such courts exist.<sup>2</sup> When there is no separate court of equity, as in Pennsylvania, it is enforced by courts of law.<sup>3</sup>

1 *Ante*, § 190.

2 Sturgis *v.* Champneys, 5 Mylne & C. 92, 103; Blagden, 2 Rose, 251; Oswell *v.* Probert, 2 Ves. Jr. 680; cases *ante*, § 190, n. 11.

3 Rees *v.* Waters, 9 Watts, 90, 94.

§ 192. On whose application wife's equity is enforced. — In cases where a fund is actually in court, and it appears that it would be payable to a married woman if she were not married, the court before distributing it may inquire whether such married woman has had a settlement, and if she has not may make one on her.<sup>1</sup> Or if there is a trustee of such fund he may ask the court to direct him to pay a share thereof to the wife.<sup>2</sup> So her husband may apply.<sup>3</sup> So she may herself by her next friend institute the proceedings and ask for a settlement.<sup>4</sup> But though children are usually included within the benefit of the settlement,<sup>5</sup> they cannot apply therefor,<sup>6</sup> and the settlement must be made during the wife's life.<sup>7</sup> In cases where she does not herself apply the court may summon her for the purpose of consulting her,<sup>8</sup> but she may in open court waive her right.<sup>9</sup>

1 See *Britton*, 9 Beav. 143; *Murray v. Elibank*, 13 Ves. 1; *Woodward*, 8 Irish. Eq. 50; *Duvall v. Farmers*, 4 Gill & J. 232; 23 Am. Dec. 558; *Hallenbeck v. Bradt*, 2 Paige, 316; *Myers*, Bail. Eq. 23; 1 Dan. Ch. Pr. 91; 2 *Perry Trusts*, § 627.

2 See *Swan*, 2 Hem. & M. 34; *Elibank v. Montolieu*, 5 Ves. 737, 743; 1 *White & T. Lead. Cas.* 424, 623, 628.

3 See *Kenny v. Udall*, 5 Johns. Ch. 464, 470, 473.

4 *Elibank v. Montolieu*, 5 Ves. 737, 743; 1 *White & T. Lead. Cas.* 424; *Wallace v. Auldjo*, 1 DeGex, J. & J. 613; *Eedes*, 11 Sim. 569; *Sturgis v. Champneys*, 5 Mylne & C. 92, 105; *Woodward*, 8 Irish Eq. 50, 52; *Tobin v. Dixon*, 2 Met. 422; *Moore*, 14 Mon. B. 259; *Kenny v. Udall*, 5 Johns. Ch. 464, 470, 473; *Van Epps v. Van Deusen*, 4 Paige, 64, 74; 25 Am. Dec. 516; *Hill*, 1 Strob. Eq. 1; *Dearin v. Fitzpatrick*, Meigs, 551; *Poindexter v. Jeffries*, 15 Gratt. 363; *Barron*, 21 Vt. 375, 391, 392.

5 *Hay v. Blanks*, 7 Mon. B. 347, 348; *post*, § 195.

6 *Scriven v. Tapley*, 2 Eden, 337; *Amb.* 509; *Lloyd v. Williams*, 1 Madd. 450; *Bell*, 1 Kelly, 637; *Martin v. Sherman*, 2 Sand. Ch. 341; *Barker v. Woods*, 1 Sand. Ch. 129.

7 *Delagarde v. Lampriere*, 6 Beav. 344.

8 2 *Perry Trusts*, § 627, cases cited.

9 1 Dan. Ch. Pr. 90; *post*, § 194.

§ 193. Out of what property wife's equity to a settlement is enforced. — A court of equity may make a settlement on the wife out of any fund of hers over which it has jurisdiction,<sup>1</sup> if such fund has not been reduced to pos-



session by her husband.<sup>2</sup> Thus, such a settlement may be made out of any fund actually in court,<sup>3</sup> or held by trustees or guardians under the jurisdiction of the court,<sup>4</sup> or, as in the case of legacies,<sup>5</sup> etc., distributable in equity;<sup>6</sup> and this is so though the fund is composed of the proceeds,<sup>7</sup> or rents and profits,<sup>8</sup> of land, and whether the same has been assigned or not.<sup>9</sup> But, although a few cases hold that for the purpose of making such a settlement equity will take jurisdiction over legal choses in action or rights enforceable in courts of law,<sup>10</sup> the better established view is that equity must have jurisdiction otherwise over the fund or no settlement can be made out of it.<sup>11</sup> And no settlement can be made when the husband has obtained complete and absolute possession of the fund,<sup>12</sup> or where, as in the case of a remainder,<sup>13</sup> the fund is not reducible to possession.<sup>14</sup>

1 *Sturgis v. Champneys*, 5 Mylne & C. 92, 106; *Wiles*, 3 Md. 1, 9; 56 Am. Dec. 733; 1 *White & T. Lead. Cas.* 424; *infra*, n. 11; cases *ante*, § 190, n. 11.

2 *Murray v. Elibank*, 10 Ves. 84, 88; *infra*, n. 12.

3 *Woodward*, 8 Irish Eq. 50, 52; *Brett v. Greenwell*, 3 Younge & C. 230; *Packer*, 1 Colly. C. C. 92; *Coster*, 9 Sim. 597; *Napier*, 1 Dru. & W. 407; *Durr v. Bowyer*, 2 McCord Eq. 368, 372.

4 *Brown v. Elton*, 3 P. Wms. 202; *Blount v. Bestland*, 5 Ves. 515; *Lloyd v. Mason*, 5 Hare, 149; *Bradford v. Goldsboro*, 15 Ala. 311, 316; *Napier v. Howard*, 3 Kelly, 192, 205; *Hays v. Blanks*, 7 Mon. B. 347, 348; *Barrett v. Oliver*, 7 Gill & J. 191; *Sawyer v. Baldwin*, 20 Pick. 378, 387; *Westbrook v. Comstock*, Walk. Ch. 314; *Stevenson v. Brown*, 4 N. J. Eq. 503, 505; *Kenny v. Udall*, 5 Johns. Ch. 464, 472; *Coppedge v. Threadgill*, 3 Sneed, 577.

5 *Woodward*, 8 Irish Eq. 50, 52; *Bradford v. Goldsboro*, 15 Ala. 311, 316; *Sawyer v. Baldwin*, 20 Pick. 378, 387; *Stevenson v. Brown*, 4 N. J. Eq. 503, 505; *Barron*, 24 Vt. 375, 394.

6 *Wiles*, 3 Md. 1, 9; 56 Am. Dec. 733. See also cases cited *ante*, § 190, n. 11.

7 *Hill*, 1 Strob. Eq. 2, 16.

8 *Sturgis v. Champneys*, 5 Mylne & C. 92, 105; *Duncomb v. Greenacre*, 28 Beav. 472; 2 DeGex F. & J. 509; *Smith v. Matthews*, 3 DeGex F. & J. 139; *Hanson v. Keating*, 4 Hare, 1; *Freeman v. Farily*, 11 Jur. 447; *Smith v. Long*, 1 Met. (Ky.) 486; *Barron*, 24 Vt. 375, 391.

9 *Sturgis v. Champneys*, 5 Mylne & C. 97, 105, 106; *Jewson v. Moulson*, 2 Atk. 417, 419; *Macaulay v. Phillips*, 4 Ves. 9; 1 *White & T. Lead. Cas.* 447, 640; *Kenny v. Udall*, 5 Johns. Ch. 464, 473, 477; *ante*, § 190.

10 *Winch v. Page*, Busb. 86, 87; *Carley*, 22 Ga. 178; *Parson*, 9 N. H. 309; *Dearin v. Fitzpatrick*, Meigs, 551; *Barron*, 24 Vt. 375, 392; 1 Bish. M. W. §§ 633, *et seq.*

11 *Wiles*, 3 Md. 1, 9; 56 Am. Dec. 733. See *Guild*, 16 Ala. 121; *Sims v. Spaulding*, 2 Duval, 121; *Smith v. Peyton*, 6 Mon. 263; *Thrasher v. Tuttle*, 22 Me. 335; *State v. Krebs*, 6 Har. & J. 31, 37; *Mann v. Higgins*, 7 Gill, 265; *Hall*, 4 Md. Ch. 283; *McVey v. Boggs*, 3 Md. Ch. 94; *Carter*, 14 Smedes & M. 59; *Udall v. Kenny*, 3 Cowen, 591, 599, 609; *Haviland v. Bloom*, 6 Johns. Ch. 25, 178; *Myers*, Bail. Eq. 23; *Heath*, 2 Hill Ch. 100, 104; *Dold v. Geiger*, 2 Gratt. 98, 103, 104; *Poindexter v. Jeffries*, 15 Gratt. 363.

12 *Murray v. Elibank*, 10 Ves. 84, 88; *Pool v. Morris*, 29 Ga. 374; *Hurdt v. Courtenay*, 4 Met. (Ky.) 139; *Rees v. Waters*, 9 Watts, 90; *Thomas v. Sheppard*, 2 McCord Ch. 36; 16 Am. Dec. 632; *Mitchell v. Sevier*, 9 Humph. 146; *Barron*, 24 Vt. 375, 392; *ante*, §§ 176-182.

13 *Browning v. Headley*, 2 Rob. (Va.) 340; 40 Am. Dec. 755.

14 See *Socket v. Wray*, 2 Atk. 6, n.; *Frazer v. Bailie*, 1 Bro. Ch. 518; *Richards v. Chambers*, 10 Ves. 580; *Woollands v. Crowcher*, 12 Ves. 175; *Duberly v. Day*, 16 Beav. 33; *Sale v. Saunders*, 24 Miss. 24; 57 Am. Dec. 157; *Terry v. Brunson*, 1 Rich. Eq. 78; *Reese v. Holmes*, 5 Rich. Eq. 531; *Goodwin v. Moore*, 4 Humph. 221; *Moore v. Thornton*, 7 Gratt. 99. *Contra*, *Jackson v. Sublett*, 10 Mon. B. 469; *Weeks*, 5 Ired. Eq. 111; 47 Am. Dec. 358; *Similie*, 22 Pa. St. 130.

§ 194. Under what circumstances the wife's equity is enforced.—Whether a settlement shall be made seems to be determined by the practice of the particular court, and to be within its discretion.<sup>1</sup> In cases where it would grant to a wife maintenance,<sup>2</sup> or a divorce with alimony,<sup>3</sup> it would not hesitate to make her an allowance out of her funds within its jurisdiction.<sup>4</sup> Her conduct and condition affect the amount of the settlement<sup>5</sup> rather than the right to it;<sup>6</sup> she does not forfeit her right by living separate from her husband,<sup>7</sup> though she does, probably, by living in adultery.<sup>8</sup> So when the amount of her fund has been determined,<sup>9</sup> and she is of full age,<sup>10</sup> she may waive her equity,<sup>11</sup> though this must be done in open court,<sup>12</sup> or in some equally formal manner,<sup>13</sup> her mere joinder in her husband's assignment not being sufficient.<sup>14</sup> The smallness of the fund is no bar to the settlement.<sup>15</sup> But the wife may be barred as against assignees by her fraud.<sup>16</sup>

1 *Kenny v. Udall*, 5 Johns. Ch. 464, 474. See *Giacometti v. Producers*, Law R. 14 Eq. 253; *Scott v. Spashett*, 16 Jur. 157; *Coster*, 9 Sim. 597; *Brett v. Greenwell*, 3 Younge & C. 230.

- 2 Stewart M. & D. § 179.
- 3 Stewart M. & D. §§ 358-399.
- 4 Renwick, 10 Paige, 421; Haviland v. Myers, 6 Johns. Ch. 25, 173; Rees v. Waters, 9 Watts, 90.
- 5 Post, § 196.
- 6 Carter, 14 Smedes & M. 59. Compare Stewart M. & D. § 371.
- 7 Eedes, 11 Sim. 569; Greedy v. Lavender, 13 Beav. 62; Carter, 14 Smedes & M. 59.
- 8 Carr v. Estebrooke, 4 Ves. 146; Ball v. Montgomery, 2 Ves. Jr. 191; Watkyns, 2 Atk. 97; Lewin, 20 Beav. 378.
- 9 Edmunds v. Townshend, 1 Anstr. 93; Jernegan v. Baxter, 6 Madd. 32; Sperling v. Rochfort, 8 Ves. 180; Packer, 1 Colly. C. C. 92; Watson v. Marshall, 17 Beav. 363; Bendyshe, 3 Jur. N. S. 727.
- 10 Shlpway v. Ball, Law R. 16 Ch. D. 376; Stubbbs v. Targan, 2 Beav. 496; Abraham v. Newcombe, 12 Sim. 566; Warfield, 11 Gill & J. 23; Udall v. Kenny, 3 Cowen, 590; Cheatam v. Huff, 2 Tenn. Ch. 616; Phillips v. Hessel, 10 Humph. 197.
- 11 And see Smith v. Atwood, 14 Ga. 402; Wright v. Arnold, 14 Mon. B. 638; Geddes, 4 Rich. Eq. 301; 57 Am. Dec. 730; Clark v. Smith, 13 S. C. 585.
- 12 1 Dan. Ch. Pr. 95; Campbell v. Freach, 2 Ves. 321; May v. Roper, 4 Sim. 360; Ward v. Amory, 1 Curt. 419; Coppedge v. Threadgill, 3 Sneed, 577.
- 13 Packer, 1 Colly. C. C. 92; 1 Dan. Ch. Pr. 95; cases *supra*, n. 12.
- 14 Kenny v. Udall, 5 Johns. Ch. 464, 470, 471; *ante*, § 181.
- 15 Kincaid, 17 Eng. L. & Eq. 396; 1 Drew. 326; Cutler, 14 Beav. 224; Roberts v. Collett, 6 Smale & G. 138.
- 16 Lush, Law R. 4 Ch. 591; Sharpe v. Foy, Law R. 4 Ch. 35.

§ 195. For whose benefit wife's equity is enforced.—The income is usually left with the husband when he is living with and supporting his wife at the time of the settlement,<sup>1</sup> but if they are living apart,<sup>2</sup> or for some other reason she needs the income for her daily support,<sup>3</sup> both principle and income are settled upon her.<sup>4</sup> The settlement is made on her and her children,<sup>5</sup> including children unborn,<sup>6</sup> and children of any future husband.<sup>7</sup> Still she may waive the settlement as against the children,<sup>8</sup> and is entitled thereto though the children are provided for,<sup>9</sup> and the children have not by themselves any right to a settlement.<sup>10</sup> After her death they may enforce any settlement made during her life.<sup>11</sup> At what time their rights attach seems doubtful—according to differing views this occurs on

institution of the suit,<sup>12</sup> on the making of an interlocutory order,<sup>13</sup> on agreement to refer to arbitration,<sup>14</sup> after reference to a master and before his report,<sup>15</sup> or only on the rendition of the final decree,<sup>16</sup> or some order equivalent thereto.<sup>17</sup> Her waiver or death after such time has no effect on the rights.<sup>18</sup> If the wife dies without children, the husband,<sup>19</sup> or his next of kin<sup>20</sup> takes the settlement.

1 Watkyns, 2 Atk. 96, 98; Kenny v. Udall, 5 Johns. Ch. 464, 480; Barron, 24 Vt. 375, 395.

2 Oxenden, 2 Vern. 474; Eedes, 11 Sim. 569; *infra*, n. 4.

3 Coster, 1 Keen, 200; Wright v. Morley, 11 Ves. 23; *infra*, n. 4.

4 See Elliott v. Cardell, 5 Madd. 156; Jacobs v. Amyatt, 1 Madd. 376; Coysegame, 1 Atk. 192; Watkyns, 2 Atk. 96; Bond v. Simmons, 3 Atk. 19; Sleech v. Thorington, 2 Ves. Sr. 562; Wright v. Morley, 11 Ves. 23; Guy v. Perkes, 18 Ves. 196; Duncan, 19 Ves. 396; Ball v. Montgomery, 2 Ves. Jr. 191; Burden v. Dean, 2 Ves. Jr. 609; Brown v. Clark, 3 Ves. 166; Lumb v. Milnes, 5 Ves. 517; Coster, 1 Keen, 200; 9 Sim. 600; Vaughan v. Buck, 13 Sim. 404; Eedes, 11 Sim. 569; Duffey, 28 Beav. 386; Squires v. Ashford, 23 Beav. 132; Koeber v. Sturgis, 22 Beav. 588; Wilkinson v. Charlesworth, 16 Law J. Ch. 387; Montefiore v. Behrens, Law R. 1 Eq. 171; Van Dugen, 6 Paige 366.

5 Murray v. Elibank, 13 Ves. 1, 6; Johnson, 1 Jacob & W. 479; Grosvenor v. Lane, 2 Lane, 2 Ark. 180; Hays v. Blanks, 7 Mon. B. 347, 348; Bennet v. Dillingham, 2 Dana, 436; Hall, 4 Md. Ch. 253; Mann v. Higgins, 7 Gill, 265; Mumford v. Murray, 1 Paige, 620; Kenny v. Udall, 5 Johns. Ch. 464.

6 Croxton v. May, Law R. 9 Eq. 404; cases *supra*, n. 5.

7 Croxton v. May, Law R. 9 Eq. 404.

8 Delagarde v. Lempriere, 6 Beav. 363; Baldwin, 5 DeGex & S. 219.

9 Pryor v. Hill, 4 Bro. C. C. 133.

10 Scriver v. Tapley, Amb. 509; 2 Eden, 337; Greer v. Boone, 5 Mon. B. 554; *ante*, ‡ 192.

11 Murray v. Elibank, 13 Ves. 1; 14 Ves. 496; 1 White & T. Lead. Cas. 424.

12 Steinmetz v. Halthin, 1 Glyn & J. 64. *Contra*, Wallace v. Auldjo, 1 DeGex J. & S. 643; 8 Hare, 10.

13 Gower v. Clarke, 1 Keen, 132; Grove v. Perkins, 6 Sim. 534.

14 Lloyd v. Mason, 5 Hare, 149; 14 Law J. N. S. Ch. 257.

15 Murray v. Elibank, 14 Ves. 496; Micauley v. Phillips, 4 Ves. 15; Baldwin, 5 DeGex & S. 319; 15 Eng. Law & Eq. 158; Hobgood v. Martin, 31 Ga. 62.

16 Murray v. Elibank, 10 Ves. 84; Lloyd v. Williams, 1 Madd. 450; Delagarde v. Lempriere, 6 Beav. 347; Greer v. Boone, 5 Mon. B. 554.

17 Murray v. Elibank, 13 Ves. 84; Gardner, 2 Ves. Sr. 671; Whittem v. Sawyer, 1 Beav. 533.

18 Barker v. Lea, Madd. & G. 330; *supra*, n. 17.

19 Walsh v. Mason, Law R. 8 Ch. 482.

20 *Carter v. Taggart*, 1 DeGex M. & G. 286; *Bagshaw v. Winter*, 5 DeGex & S. 466.

§ 196. The amount of the settlement to which wife's equity entitles her.—The amount of the settlement is largely within the discretion of the court,<sup>1</sup> and depends upon the circumstances of the particular case.<sup>2</sup> The court considers the age and condition of the wife,<sup>3</sup> the ages and number of the children,<sup>4</sup> her pecuniary wants,<sup>5</sup> and whether any previous settlement has been made;<sup>6</sup> it will be more inclined to be liberal to the wife as against her husband than as against his assignees for value.<sup>7</sup> In some cases, as where the husband is insolvent,<sup>8</sup> or is living separate from her by his fault,<sup>9</sup> or her needs are great,<sup>10</sup> the whole may be awarded her;<sup>11</sup> or at least the greater part.<sup>12</sup> One half is an ordinary allowance.<sup>13</sup> Less will be awarded her if she is in fault.<sup>14</sup>

1 *Kenny v. Udall*, 5 Johns. Ch. 464, 479.

2 *Elibank v. Montolien*, 5 Ves. 737, 743; 1 *White & T. Lead. Cas.* 424; *Jewson v. Moulson*, 2 Atk. 423; *Worrall v. Marlur*, 1 Cox, 153; *Brown v. Clarke*, 3 Ves. 166; *Chassaing v. Parsonage*, 5 Ves. 15; *Pearce v. Crutchfield*, 14 Ves. 206; *Dunkley*, 2 DeGex, M. & G. 396; *Bagshaw v. Winter*, 5 DeGex & S. 466; *Coster*, 9 Sim. 597; *Gardner v. Marshall*, 14 Sim. 575; *Green v. Otte*, 1 Susses & S. 250; *Francis v. Brooking*, 19 Beav. 347; *Marshall v. Fowler*, 16 Beav. 249; *Beeman v. Cowser*, 22 Ark. 429; *Napier v. Howard*, 3 Kelly, 205; *Bowling v. Winslow*, 5 Mon. B. 31; *Hall*, 4 Md. Ch. 283, 286; *McVey v. Boggs*, 3 Md. Ch. 94; *Bennett v. Oliver*, 7 Gill & J. 191; *Helms v. Franciscus*, 2 Bland, 545; 20 Am. Dec. 402; *Kenny v. Udall*, 5 Johns. Ch. 464, 478, 479; *White v. Gouldin*, 27 Gratt. 491; *Barron*, 24 Vt. 375, 395.

3 *Davis v. Newton*, 6 Met. 537, 544.

4 *Barron*, 24 Vt. 375, 395.

5 *Kenny v. Udall*, 5 Johns. Ch. 464, 479.

6 *Elibank v. Montolieu*, 5 Ves. 737, 743; *Dunkley*, 2 DeGex, M. & G. 390.

7 See cases cited *supra*, n. 2.

8 *White v. Cordwell*, Law R. 20 Eq. 644; *Brett v. Greenwell*, 3 Younge & C. 230.

9 *Burrows* 12 Eng. L. & Eq. 268.

10 *Gent v. Harris*, 10 Hare, 353; *supra*, n. 2.

11 *Brett v. Greenwell*, 3 Younge & C. 230; *Renwick*, 10 Paige, 421; *Rees v. Waters*, 9 Watts, 90; *supra*, n. 2.

12 *Coster*, 9 Sim. 597; *Spirett v. Willows*, Law R. 1 Ch. 520; Law R. 4 Ch. 407.

13 *Peachey Mar. Sett.* 176, 177; 2 *Bright. H. & W.* 241; cases cited.

14 Compare *Stewart M. & D.* § 371; *ante*, § 194.

H. & W. — 24.

## CHAPTER XII.

### WIFE'S EQUITABLE SEPARATE ESTATE.

- § 197. Defined.
- § 198. Creation of.
- § 199. Settlor's intent to exclude husband.
- § 200. Words which show such intent.
- § 201. Present and future husbands.
- § 202. Necessity of trustee — Husband as trustee.
- § 203. Wife's control over.
- § 204. Restraints on alienation and anticipation.
- § 205. Wife's power to dispose of *inter vivos*.
- § 206. Wife's power to contract concerning — Rules.
- § 207. Wife's power to contract concerning — Decisions.
- § 208. Wife's power to will.
- § 209. Wife's rights in increase — Rents, profits, etc.
- § 210. Remedies of wife concerning.
- § 211. Remedies against.
- § 212. Rights of husband and his creditors over.
- § 213. How lost or extinguished.
- § 214. Effect of death upon.
- § 215. Effect of divorce upon.
- § 216. Effect of modern statutes upon.

§ 197. *Wife's equitable separate estate defined.* — A married woman's equitable separate property (also called her "*sole and separate estate*")<sup>1</sup> is property which is so settled<sup>2</sup> upon her that courts of equity<sup>3</sup> recognize it during her coverture<sup>4</sup> as her own,<sup>5</sup> unaffected by her husband's marital rights.<sup>6</sup> In her ordinary equitable estates all the marital rights of her husband exist;<sup>7</sup> but by the recognition of the wife's equity,<sup>8</sup> and of her sole and separate estate,<sup>9</sup> courts of equity to some degree diminished the harshness of the common-law rules.<sup>10</sup> This estate is still of importance, as married women separate property acts have not destroyed it.<sup>11</sup>

1 *Clarke v. Windham*, 12 Ala. 798, 800; 2 *Perry Trusts*, § 646.

2 As to creation of, see *post*, § 198.

- 3 As to jurisdiction of courts of law and of equity, see *post*, § 210.
- 4 As to effect of dissolution of marriage, see *post*, §§ 214, 215.
- 5 As to rights and powers of wife over, see *post*, §§ 203-211.
- 6 As to rights of husband and his creditors over, see *post*, § 212.
- 7 *Banks v. Green*, 35 Ark. 84, 88; *ante*, §§ 148, 157, 164, 191; *post*, § 199, n.
- 8 *White v. Gouldin*, 27 Gratt. 491, 507; *ante*, §§ 190-196.
- 9 *Hulme v. Tenant*, 1 Bro. C. C. 16; 1 *White & T. Lead. Cas.* 481, 4th Am. ed. 679.
- 10 2 *Perry Trusts*, § 625.
- 11 *Short v. Battle*, 52 Ala. 456, 466, 467; *post*, § 216.

§ 198. Creation of wife's equitable separate estate. — A wife's equitable separate estate is created by a settlement to her sole and separate use.<sup>1</sup> The settlement may be antenuptial<sup>2</sup> or postnuptial,<sup>3</sup> written,<sup>4</sup> or in the case of personalty oral,<sup>5</sup> by deed,<sup>6</sup> or by will,<sup>7</sup> in trust,<sup>8</sup> or direct;<sup>9</sup> it may and generally does refer only to property which it vests in her,<sup>10</sup> but it may also as in the case of an antenuptial agreement between her husband and herself,<sup>11</sup> refer to property otherwise,<sup>12</sup> or in some special way,<sup>13</sup> acquired. The settlor may be a stranger,<sup>14</sup> her husband,<sup>15</sup> or herself.<sup>16</sup> The settlee may be unmarried and unengaged,<sup>17</sup> unmarried but on the eve of marriage,<sup>18</sup> or already married.<sup>19</sup> The sole requisite is that the terms<sup>20</sup> of the settlement show that it was intended by the settlor,<sup>21</sup> that in the property in question<sup>22</sup> the husband in question<sup>23</sup> should have no marriage rights.<sup>24</sup> If the settlement is made by a stranger and is accepted by the husband, both erroneously supposing that it creates an equitable separate estate in the wife, it will be given this effect;<sup>25</sup> but ordinarily the husband by treating the wife's realty as her own does not create in her a separate estate therein;<sup>26</sup> and so of her personalty,<sup>27</sup> unless his conduct proves a gift from him to her.<sup>28</sup>

1 *Darby*, 3 Atk. 399; cases cited *infra*.

2 See "Antenuptial Settlements," discussed *Stewart M. & D.* §§ 32-43.

3 See POSTNUPTIAL SETTLEMENTS, discussed *ante*, §§ 99-134; "Deeds of Separation," discussed Stewart M. & D. §§ 181-192.

4 Morrison v. Thistle, 67 Mo. 546, 599.

5 Porter v. Bank, 19 Vt. 410, 419. S. P. Betts, 18 Ala. 787, 790; Gillespie v. Burlinson, 28 Ala. 551, 564; Watson v. Broadbush, 6 Bush, 328, 329; Chew v. Beall, 13 Md. 348, 360; George v. Spencer, 2 Md. Ch. 353, 360; Jackson v. McAliley, Spear Eq. 203, 307; 40 Am. Dec. 620; Pond v. Skeen, 2 Lea, 126, 130, 131.

6 Paul v. Leavitt, 53 Mo. 595, 598.

7 Lee v. Prieaux, 3 Bro. Ch. 381, 385.

8 Fears v. Brooks, 12 Ga. 195, 197; *post*, § 202.

9 Wood, 83 N. Y. 575, 579; *post*, § 202.

10 Mounser v. Duke, 53 Ga. 277, 281.

11 Stewart M. & D. §§ 32-43.

12 Klenke v. Koeltze, 75 Mo. 239, 243.

13 As in the case of her earnings, *ante*, § 65.

14 Sledge v. Clopton, 6 Ala. 589, 599; Charles v. Coker, 2 S. C. (N. S.) 122, 129, 133.

15 Williams, 68 Ala. 405, 406.

16 Dean v. Brown, 2 Car. & P. 62, 63; Arnold v. Woodhanes, Law R. 16 Eq. 29, 33. Before marriage if not in evasion of marriage rights: See Stewart M. & D. § 41.

17 Newlands v. Paynter, 4 Mylne & C. 408, 417, 418; Tullett v. Armstrong, 1 Beav. 1; 4 Mylne & C. 377, 390; Metropolitan v. Taylor, 53 Mo. 441, 451; Shirley, 9 Paige, 363, 364; Beaufort v. Collier, 6 Humph. 487, 491; 44 Am. Dec. 321. The rule was formerly otherwise: See Massey v. Parker, 2 Mylne & K. 174; Lindsey v. Harrison, 2 Eng. 311; Gully v. Hall, 31 Miss. 20; Bridges v. Wilkins, 3 Jones Eq. 342; Muler v. Bingham, 1 Ired. 423; Hamersley v. Smith, 4 Whart. 126. So in Pa. now: Snyder, 92 Pa. St. 504, 509. See further *post*, § 201.

18 Snyder, 92 Pa. St. 504, 509.

19 Mounser v. Duke, 53 Ga. 277, 281.

20 Paul v. Leavitt, 53 Mo. 595, 598; Pond v. Skeen, 2 Lea, 126, 130, 131.

21 Vail, 49 Conn. 52, 53; *post*, § 199.

22 Klenke v. Koeltze, 75 Mo. 239, 243, 244; *supra*, notes 10-12.

23 Tullett v. Armstrong, 1 Beav. 1; 4 Mylne & C. 377, 390.

24 Bowen v. Lebre, 2 Bush, 112, 115; *post*, § 199, n. 3.

25 Mounser v. Duke, 53 Ga. 277, 281. See Betts, 18 Ala. 787, 791.

26 Klenke v. Koeltze, 75 Mo. 239, 243.

27 Pond v. Skeen, 2 Lea, 126, 132.

28 Welch, 63 Mo. 51, 61; *ante*, § 127.

§ 199. The settlor's intent to exclude the husband's marriage rights.—The settlor's intent to *exclude*<sup>1</sup> the husband's marriage rights in the property must *clearly*<sup>2</sup> appear from the terms of the settlement, to create in the wife an equitable separate estate therein.<sup>3</sup> If no



such intent appears, there is created at best an ordinary trust for a married woman, in which the husband has all marriage rights,<sup>4</sup> subject only to his wife's equity to a settlement.<sup>5</sup> When it is a settlement of personalty made orally,<sup>6</sup> the settlor's intent may be proved by his declarations, etc., made at the time.<sup>7</sup> But in the case of a written settlement, while the court will search the four corners of the document and be satisfied if the intent appears in any part thereof,<sup>8</sup> and while it will allow an ordinary deed to be controlled by an antenuptial settlement,<sup>9</sup> it will not allow an ordinary deed to be changed by parol into a deed to the wife's sole and separate use,<sup>10</sup> applying rigorously the rule that the terms of a document may not be altered by oral evidence.<sup>11</sup> In the case of a settlement by the husband of personalty his intent to exclude his rights will be presumed,<sup>12</sup> otherwise the settlement would have no effect at all;<sup>13</sup> but if it is of realty the instrument must show his intent or he will take the rents and profits,<sup>14</sup> as he does of her other realty.<sup>15</sup> Still the intent to give the wife the sole enjoyment of her property will be more readily proved in a settlement from her husband than in one from a stranger.<sup>16</sup> The technical words to show this intent are properly inserted in the *habendum*,<sup>17</sup> and are, "to have and to hold to her sole and separate use";<sup>18</sup> but no technical words are necessary,<sup>19</sup> and many other phrases have been held equally conclusive.<sup>20</sup>

1 Bowen v. Lebrece, 2 Bush, 112, 115; Paul v. Leavitt, 53 Mo. 595, 598; Beaufort v. Collier, 6 Humph. 487, 490; 44 Am. Dec. 321; *infra*, n. 3.

2 Vail, 49 Conn. 52, 53; Buck v. Wroten, 24 Gratt. 250, 253, 255; *infra*, n. 3.

3 Hulme v. Tenant, 1 Bro. C. C. 16; 1 White & T. Lead. Cas. 481, 4th Am. ed. 679; Ray, 1 Madd. 199, 207; Prout v. Roby, 15 Wall. 471, 474; Hale v. Stone, 14 Ala. 803, citing cases; Cook v. Kennerly, 12 Ala. 42, 46; Jenkins v. McConico, 26 Ala. 213, 238; Gaines v. Poor, 3 Met. (Ky.) 503, 508; Bowen v. Lebrece, 2 Bush, 112, 115; Watson v. Broadbuss, 6 Bush, 328, 329; Brant v. Mickle, 23 Md. 426, 449; Carroll v.

Lee, 3 Gill & J. 505, 508; 22 Am. Dec. 350; Williams v. Claiborne, 7 Smedes & M. 488, 495; Hunt v. Booth, 1 Freeman. 215, 218; Paul v. Leavitt, 53 Mo. 595, 598; Metropolitan v. Taylor, 53 Mo. 444, 450; Ascroft v. Little, 4 Ired. Eq. 236, 238; Rudisell v. Watson, 2 Dev. Eq. 430, 432; Pond v. Skeen, 2 Lea, 126, 131; Buck v. Wroten, 24 Gratt. 250, 253; *infra*, n. 19.

4 Rich v. Cockell, 9 Ves. 370, 377; Lumb v. Milnes, 5 Ves. 517; Brown v. Clark, 3 Ves. 166; Spirett v. Willows, 11 Jur. N. S. 70; Williams v. Maull, 20 Ala. 721, 727; Lenoir v. Blinney, 15 Ala. 667; Banks v. Green, 35 Ark. 84, 88; Vail, 49 Conn. 52, 54; Taylor v. Stone, 13 Smedes & M. 653; Hunt v. Booth, 1 Freeman. 215, 218; Evans v. Kuorr, 4 Rawle, 66; Graham, Riley, 142; Mayberry v. Neely, 5 Humph. 337, 339; *ante*, ‡ 148, 160, 164.

5 White v. Gouldin, 27 Gratt. 491, 507; *ante*, ‡ 190-196.

6 Chew v. Beall, 13 Md. 348, 360; *ante*, ‡ 198.

7 Watson v. Broadbush, 6 Bush, 328, 329; Pond v. Skeen, 2 Lea, 126, 130, 131; Porter v. Bank, 19 Vt. 410, 419.

8 Morrison v. Thistle, 67 Mo. 596, 599.

9 Klenke v. Koeltze, 75 Mo. 239, 243, 244.

10 Paul v. Leavitt, 53 Mo. 595, 598.

11 Stephens' Digest, art. 90; Paul v. Leavitt, 53 Mo. 595, 598.

12 Deming v. Williams, 26 Conn. 226, 231. See Whitten, 3 Cush. 194, 199; Wells v. Treadwell, 28 Miss. 717, 725; Steel, 1 Ired. Eq. 452, 455; Benedict v. Montgomery, 7 Watts & S. 238, 242; 42 Am. Dec. 230; Powell, 9 Humph. 477, 486.

13 Personalty would vest in him again at once at common law: *Ante*, ‡ 170. Perhaps under statutes a statutory separate estate would be created if no apparent intent: Williams, 68 Ala. 405, 406.

14 Hoyt v. Parks, 39 Conn. 359, 360; Plumb v. Joes, 39 Conn. 120, 123; Hutchinson v. Mitchell, 39 Tex. 487, 492.

15 Allen v. Hooper, 50 Me. 371, 373; *ante*, ‡ 146-150.

16 Mounger v. Duke, 53 Ga. 277, 281. Presumed in case of deed of separation: Gaines v. Poor, 3 Met. (Ky.) 503, 508.

17 Not necessarily: Morrison v. Thistle, 67 Mo. 596, 599.

18 Darby, 3 Atk. 399; Williams v. Maull, 20 Ala. 721, 723, 729; Clarke v. Windham, 12 Ala. 798, 800.

19 Stanton v. Hall, 2 Russ. & M. 175, 180; Pritchard v. Ames, Turn. & R. 222, 223; Prout v. Roby, 15 Wall. 471, 474; Hale v. Stone, 14 Ala. 803; Fears v. Brooks, 12 Ga. 195, 198; Brant v. Mickle, 28 Md. 436, 449; Morrison v. Thistle, 67 Mo. 596, 599; Street v. Kissam, 2 Barb. 494, 496; Davis v. Cain, 1 Ired. Eq. 305, 307; Heathman v. Hall, 3 Ired. Eq. 414, 420; Charles v. Coker, 2 S. C. (N. S.) 122, 133; Hamilton v. Bishop, 8 Yerg. 33, 40; Beaufort v. Collier, 6 Humph. 487, 491; 44 Am. Dec. 321; Nixon v. Rose, 12 Gratt. 425, 428; Porter v. Bank, 19 Vt. 410, 419; *post*, ‡ 200.

20 Metropolitan v. Taylor, 53 Mo. 444, 450; *post*, ‡ 200.

‡ 200. Words in settlement on married woman which show intent to exclude husband's rights.—No technical words are necessary to create an equitable separate estate in a married woman,<sup>1</sup> but the terms of the settle-

ment must show the settlor's intent to secure the property to her free from marital rights.<sup>2</sup>

1. The following phrases by themselves have this effect: "For her sole and separate use."<sup>3</sup> "For her sole use."<sup>4</sup> "As her separate estate."<sup>5</sup> "Only as and for her own separate estate, free from the control of her husband."<sup>6</sup> "For her full and sole use and benefit."<sup>7</sup> "For her own sole use and benefit."<sup>8</sup> "For her sole use and benefit."<sup>9</sup> "To her exclusive use, benefit, and behoof."<sup>10</sup> "For her exclusive use and benefit."<sup>11</sup> "For her exclusively."<sup>12</sup> "For her sole and absolute use."<sup>13</sup> "For her own use and at her own disposal."<sup>14</sup> "For her sole use, benefit, and disposition."<sup>15</sup> "To be at her own disposal, and to do therewith as she shall think fit."<sup>16</sup> "To be hers and hers only."<sup>17</sup> "For her without any hindrance or molestation whatever."<sup>18</sup> "For her own use and benefit independent of any other person."<sup>19</sup> "For her own use independent of any husband."<sup>20</sup> "Not subjected to the control of her husband."<sup>21</sup> "Her husband to have no control."<sup>22</sup> "Not to be sold, bartered, or traded by the husband."<sup>23</sup> "For her livelihood."<sup>24</sup> "As an allowance for her pin-money."<sup>25</sup> And perhaps such provisions as "her receipt to be a sufficient discharge,"<sup>26</sup> "to her free from her husband's debts,"<sup>27</sup> "to her to receive the rents while she lives whether married or single."<sup>28</sup>

2. The following phrases by themselves have not this effect: "To A's wife."<sup>29</sup> "In trust for her."<sup>30</sup> "For her use."<sup>31</sup> "For her own use."<sup>32</sup> "For her proper use."<sup>33</sup> "In trust for her for life to pay the same to her and her assigns."<sup>34</sup> "To her and her children."<sup>35</sup> "To enjoy as she sees fit."<sup>36</sup> "For joint use of herself and her husband."<sup>37</sup> And perhaps, "to be free from her husband's debts."<sup>38</sup>

3. Where the words are in themselves ambiguous,

the court looks all through the settlement to explain them and find the intent,<sup>39</sup> and so in one case the settlement was held to create a separate estate because it was made "for fear she might marry some improvident man";<sup>40</sup> it will likewise consider the circumstances under which it was made,<sup>41</sup> and the fact that the woman is married or about to marry is important.<sup>42</sup> On the other hand words ordinary sufficient may be so used as not to create a separate estate,<sup>43</sup> as where a man devised property "to the sole use and benefit" of his widow, and it was held he did not contemplate a future marriage or thereby create a separate estate.<sup>44</sup>

4. Words which exclude one husband do not necessarily exclude all,<sup>45</sup> and words which exclude a husband's rights during coverture do not necessarily exclude his rights as widower.<sup>46</sup>

1 Brant v. Mickle, 23 Md. 436, 449; *ante*, § 199.

2 Wood v. Polk, 12 Heisk. 220, 223, 224; *ante*, § 199.

3 Parker v. Brooke, 9 Ves. 583, 587; Adamson v. Armitage, 19 Ves. 415; Darby, 3 Atk. 399; Archer v. Rorke, 7 Irish Eq. 478, 481; Williams v. Maull, 20 Ala. 721, 728, 729; Clarke v. Windham, 12 Ala. 798, 800; Robinson v. O'Neal, 56 Ala. 541; Swain v. Duane, 48 Cal. 358; Townshend v. Matthews, 10 Md. 251, 255.

4 Lindsell v. Thacker, 12 Sim. 178, 184; Ray, 1 Madd. 199, 207; Archer v. Rorke, 7 Irish. Eq. 478, 481; Fears v. Brooks, 12 Ga. 195, 198; Guishaber v. Hairman, 2 Bush. 320, 321; Steel, 1 Ired. Eq. 452; Eastwick, 13 Phila. 350.

5 Fox v. Hawks, Law R. 13 Ch. D. 822, 832; Swain v. Duane, 48 Cal. 358, 360; Fears v. Brooks, 12 Ga. 195, 198.

6 Wood, 83 N. Y. 575, 579.

7 Arthur, 11 Irish Eq. 511, 513.

8 Killick, 3 Mont. D. & D. 480, 487; Inglefield v. Coghlan, 2 Colly. C. C. 247; Heathman v. Hall, 3 Ired. Eq. 414.

9 Lyne, Younge, 562.

10 Williams v. Avery, 38 Ala. 115, 117.

11 Hutchins v. Dixon, 11 Md. 29, 37.

12 Gould v. Hill, 18 Ala. 84, 86.

13 Davis v. Prout, 7 Beav. 288; Short v. Battle, 52 Ala. 456.

14 Prichard v. Ames, Turn. & R. 222, 223.

15 Ray, 1 Madd. 199, 203, 204, 207.

16 Kirk v. Paulin, 9 Vin. Abr. 96, pl. 43. But see *infra*, n. 35.

17 Ellis v. Woods, 9 Rich. Eq. 19; Ogley v. Ikelheimer, 26 Ala. 332, 336.

- 18 *Newman v. James*, 12 Ala. 29, 31; *Clarke v. Windham*, 12 Ala. 798, 800.
- 19 *Margetts v. Baringer*, 7 Sim. 482; *Williams v. Maull*, 20 Ala. 721; *Brown v. Johnson*, 17 Ala. 232, 233; *Ashcroft v. Little*, 4 Ired. Eq. 236.
- 20 *Wagstaff v. Smith*, 9 Ves. 520, 523. See *post*, § 201.
- 21 *Bain v. Lèscher*, 11 Sim. 377, 401.
- 22 *Edwards v. Jones*, 14 Week. R. 315.
- 23 *Woodrum v. Kirkpatrick*, 2 Swan, 218.
- 24 *Darby*, 3 Atk. 399; *Ray*, 1 Madd. 199, 208.
- 25 *Herbert*, Prec. Ch. 44; *Miller v. Wikes*, 1 Eq. Cas. Abr. 66. See *ante*, §§ 183, 189.
- 26 *Charles v. Coker*, 2 S. C. (N. S.) 122, 129, 133. See *Lee v. Pireaux*, 3 Bro. Ch. 381, 385; *Lumb v. Milnes*, 6 Ves. 517; *Stanton v. Hall*, 2 Russ. & M. 173, 183; *Blacklors v. Laws*, 2 Hare, 40, 43.
- 27 *Young*, 3 Jones Eq. 216, 219. But see *infra*, n. 57.
- 28 *Goulder v. Camm*, 1 De Gex, F. & J. 146, 151.
- 29 *Moore v. Jones*, 13 Ala. 296; *Fitch v. Ayer*, 2 Conn. 143, 146.
- 30 *Vail*, 49 Conn. 52, 54; *ante*, § 199, n. 4.
- 31 *Guishaber v. Hairman*, 2 Bush, 320, 321. See *Jacobs v. Amyatt*, 1 Madd. 376, n.; *Wills v. Sayers*, 4 Madd. 411; *Roberts v. Spicer*, 5 Madd. 491; *Prout v. Roby*, 15 Wall. 474; *Fears v. Brooks*, 12 Ga. 195, 198; *Merrill v. Bullock*, 105 Mass. 486; *Rudisell v. Watson*, 2 Dev. Eq. 430, 432; *Torbet v. Twining*, 1 Yeates, 432; *Clevestine*, 15 Pa. St. 499; *Tennent v. Stoney*, 1 Rich. Eq. 222; 44 Am. Dec. 213; *McDonald v. Crockett*, 2 McCord Ch. 130. But see *Steel*, 1 Ired. Eq. 452; *Good v. Harris*, 2 Ired. Eq. 638; *Hamilton v. Bishop*, 8 Verg. 33; 29 Am. Dec. 101.
- 32 *Tyler v. Lake*, 2 Russ. & M. 183, 187; *Johnes v. Lockhart*, 3 Bro. C. C. 383, n.; *Turton*, 6 Md. 375, 384; *Brant v. Mickle*, 24 Md. 436, 449. But see *Griffith*, 5 Mon. B. 113; *Heck v. Clippenger*, 5 Pa. St. 385.
- 33 *Tyler v. Lake*, 2 Russ. & M. 183, 187; *Blacklors v. Laws*, 2 Hare, 43.
- 34 *Dakins v. Berisford*, 1 Ch. Cas. 194.
- 35 *Dunn v. Bank*, 2 Ala. 152.
- 36 *Wood v. Polk*, 12 Heisk. 220, 223.
- 37 *Gould v. Hill*, 18 Ala. 81, 86; *Geyer v. Broach*, 21 Ala. 414.
- 38 *Pollard v. Merrill*, 15 Ala. 169, 171; *Gillespie v. Burlinson*, 23 Ala. 551, 564; *Lewis v. Elrod*, 38 Ala. 17, 19; *Harris v. Harbeson*, 9 Bush, 397, 403. But see *supra*, n. 27.
- 39 *Prichard v. Ames*, Turn. & R. 222, 223; *Morrison v. Thistle*, 67 Mo. 596, 599.
- 40 *Beaufort v. Collier*, 6 Humph. 487, 491; 40 Am. Dec. 321.
- 41 But not to vary the terms: *Paul v. Leavitt*, 53 Mo. 595, 598, *ante*, § 199.
- 42 *Gilbert v. Lewis*, 1 DeGex, J. & S. 38, 43.
- 43 See *Wardle v. Claxton*, 9 Sim. 521; *Lewis v. Matthews*, Law R. 2 Eq. 177; *Hackabee v. Andrews*, 34 Ala. 646, 651; *Vail*, 49 Conn. 51, 54; *Bryan v. Duncan*, 11 Ga. 67; *Clevestine*, 15 Pa. St. 499; *Foster v. Kerr*, 4 Rich. Eq. 390.
- 44 *Gilbert v. Lewis*, 1 DeGex, J. & S. 38, 43.
- 45 *Moore v. Morris*, 4 Drew. 33, 37; *post*, § 201.
- 46 *Considered*, *Stewart M. & D.* § 466; *post*, § 214.

§ 201. When rights of present and future husbands are excluded.—In the early history of equitable separate estates it was doubtful whether such estates could be created in unmarried women,<sup>1</sup> and even now in Pennsylvania the woman must at least be contemplating marriage,<sup>2</sup> but it is generally well settled at present that whether the woman is married or single makes no difference,<sup>3</sup> except in ascertaining the settlor's purpose and intent.<sup>4</sup> Still restraints on alienation have no effect except during coverture.<sup>5</sup> Where a settlement is made without reference to any particular husband, the separate estate exists against any and all husbands the woman may have.<sup>6</sup> And even when the settlement does refer expressly to a particular husband, if it contains sufficient words independently of this reference to create an equitable separate estate, the presence of such reference will not limit the estate, or prevent its existing against other husbands also.<sup>7</sup> But if the only clause rendering the estate separate refers to a particular husband, the estate will exist against no other,<sup>8</sup> as the settlor may have objected not to all husbands, but to the individual named,<sup>9</sup> and to exclude a husband's rights the intent must be clear.<sup>10</sup> Whether a particular husband is, or all husbands are excluded, is, after all, only a question of intent.<sup>11</sup>

1 *Massey v. Parker*, 2 Mylne & K. 174, overruled 4 Mylne & C. 377, 390.

2 *Snyder*, 92 Pa. St. 504, 509.

3 *Newlands v. Paynter*, 4 Mylne & C. 403, 417, 418; *Fears v. Brooks*, 12 Ga. 195, 198; *ante*, § 198, n. 16.

4 *Gilbert v. Lewis*, 1 DeGex, J. & S. 38, 48; *ante*, §§ 199, 200.

5 *Tullett v. Armstrong*, 1 Beav. 1; 4 Mylne & C. 377, 394; *post*, § 204.

6 *Tullett v. Armstrong*, 1 Beav. 1; 4 Mylne & C. 377, 390, 405; *Molyneux*, 3 I. R. Eq. 411, 416; *Gaffee*, 1 Macn. & G. 541; *Shafto v. Butler*, 40 Law J. Ch. 308; *Phillips v. Grayson*, 23 Ark. 769, 770; *Roberts v. West*, 15 Ga. 123; *Shirley*, 9 Paige, 364; *Braufort v. Collier*, 6 Humph. 487, 491; 44 Am. Dec. 321.

7 *Hawkes v. Hubback*, 11 Law R. Eq. 5, 7; *Molyneux*, 6 I. R. Eq. 411, 416; *Phillips v. Grayson*, 23 Ark. 769, 770.

8 *Moore v. Morris*, 4 Drew. 33, 37; *Benson*, 6 Sim. 126, 135.

9 *Moore v. Morris*, 4 Drew. 33, 37.

10 *Wood v. Polk*, 12 Heisk. 220, 222; *ante*, § 199.

11 2 *Perry Trusts*, §§ 652, 653.

§ 202. **Necessity of trustee of equitable separate estate—Husband as trustee.**—It was in the early history of equitable separate estates deemed necessary to create such an estate to settle the property on a trustee,<sup>1</sup> but it was soon held unnecessary to name a trustee or even to make the settlement in the form of a trust.<sup>2</sup> A trustee may be named,<sup>3</sup> but if not, the husband is deemed to have a bare legal title, and to hold in trust for his wife,<sup>4</sup> and be accountable to her as any other trustee.<sup>5</sup> In this way gifts from him to her were sustained.<sup>6</sup> Even when trustees are named, their concurrence with the wife in her dealings with the property is unnecessary,<sup>7</sup> unless required by the settlement.<sup>8</sup> In some States statutes authorize the removal of the husband from his trust;<sup>9</sup> they also authorize an appointment of a trustee for the wife,<sup>10</sup> and in making such appointment the courts have held the husband an unfit person.<sup>11</sup> Any one who takes property with knowledge of the wife's rights holds only as her trustee.<sup>12</sup>

1 *Fears v. Brooks*, 12 Ga. 195, 197.

2 *Wood*, 83 N. Y. 575, 579. *S. P. Moore v. Freeman*, Bush. 205; *Wallingsford v. Allen*, 10 Peters, 583, 594; *Sledge v. Clopton*, 6 Ala. 589, 599; *Riley*, 25 Conn. 154, 161; *Trenton v. Woodruff*, 2 N. J. Eq. 117, 126; *Shirley*, 9 Paige, 363, 364; *McKenna v. Phillips*, 6 Whart. 571; 37 Am. Dec. 438; *Thompson v. McKusick*, 3 Humph. 631; *infra*, n. 4.

3 *Radford v. Carwile*, 13 W. Va. 573, 578.

4 *Bennet v. Davis*, 2 P. Wms. 316; *Izod v. Lamb*, 1 Crompt. & J. 35, 44; *Wallingsford v. Allen*, 10 Peters, 583, 594; *Pepper v. Lee*, 53 Ala. 33; *Wilkinson v. Cheatham*, 45 Ala. 331; *Sadler v. Bean*, 9 Ark. 202; *Riley*, 25 Conn. 154, 161; *Fears v. Brooks*, 12 Ga. 195, 197; *Gover v. Owings*, 16 Md. 91, 99; *Richardson v. Stodder*, 100 Mass. 528; *Holthaus v. Hornbostle*, 60 Mo. 439; *Trenton v. Woodruff*, 2 N. J. Eq. 117, 126; *Wood*, 83 N. Y. 575, 579; *O'Brien*, 11 R. I. 419; *Boykin v. Ciples*, 2 Hill Ch. 200; *Hamilton v. Bishop*, 8 Yerg. 33; 29 Am. Dec. 101; *Porter v. Bank*, 19 Vt. 410, 420; *ante*, §§ 42, 102.

5 *Gover v. Owings*, 16 Md. 91, 99; *Green v. Brooks*, 25 Ark. 318, 324.

6 Wallingsford v. Allen, 10 Peters, 583, 594; Burdeno v. Amperse, 14 Mich. 90, 96; Crawford, 61 Pa. St. 55; *ante*, §§ 42, 125, 127, 132.

7 Essex v. Atkins, 14 Ves. 542, 547; Knowles, 86 Ill. 1, 11; Jaques v. Methodist, 17 Johns. Ch. 548; Corgell v. Dunton, 7 Pa. St. 530, 532; Burnett v. Hawpe, 25 Gratt. 481, 487; Radford v. Carwile, 13 W. Va. 573, 578.

8 Essex v. Atkins, 14 Ves. 542, 547; Fears v. Brooks, 12 Ga. 195, 200; Gelston v. Frazier, 26 Md. 329, 344; Burnett v. Hawpe, 25 Gratt. 481, 487.

9 Fisk v. Stubbs, 30 Ala. 333; *ante*, § 150.

10 Johnson v. Snow, 5 R. I. 72, 74.

11 Ely v. Burgess, 11 R. I. 115, 116. See Drew, 57 N. H. 182.

12 Sledge v. Clopton, 6 Ala. 583, 599; Fry, 7 Paige, 461, 463; Jackson v. McAuley, Spear Eq. 302, 308. Consult *ante*, §§ 45, 132.

§ 203. Wife's dominion and control over her equitable separate estate generally.—With reference to the wife's powers over her equitable separate estate two views have prevailed:<sup>1</sup> (1) That she has all the powers of a *femme sole* save those denied her by the terms of the settlement;<sup>2</sup> (2) that she has no powers save those given her by the terms of the settlement.<sup>3</sup> Under the first rule which prevails in England,<sup>4</sup> Alabama,<sup>5</sup> Arkansas,<sup>6</sup> California,<sup>7</sup> Connecticut,<sup>8</sup> Illinois,<sup>9</sup> Kentucky,<sup>10</sup> Maryland,<sup>11</sup> Missouri,<sup>12</sup> New Jersey,<sup>13</sup> New York,<sup>14</sup> Tennessee,<sup>15</sup> Texas,<sup>16</sup> Virginia,<sup>17</sup> West Virginia,<sup>18</sup> Wisconsin,<sup>19</sup> and elsewhere,<sup>20</sup> unless the settlement restrains her,<sup>21</sup> she may convey<sup>22</sup> and will<sup>23</sup> her equitable separate property and charge it with her contracts<sup>24</sup>—except perhaps the corpus of the realty<sup>25</sup>—as a *femme sole*; but among the States which have adopted this rule there is a great difference of view as to what provisions in a settlement constitute a restraint,<sup>26</sup> and as to what contracts of a married woman constitute a charge on this property.<sup>27</sup> The second rule, which prevails in Florida,<sup>28</sup> Mississippi,<sup>29</sup> North Carolina,<sup>30</sup> Pennsylvania,<sup>31</sup> Rhode Island,<sup>32</sup> and South Carolina,<sup>33</sup> and has had its advocates elsewhere,<sup>34</sup> has the merit of simplicity, for the wife can convey,<sup>35</sup> will,<sup>36</sup> or charge the property<sup>37</sup> only if so empowered, and it is liable for



her debts only if the settlement so provides.<sup>38</sup> Whatever powers the wife can exercise as a *femme sole*, she can exercise in favor of her husband,<sup>39</sup> from whom in equity she is a distinct person.<sup>40</sup>

1 Discussed in *Hulme v. Tenant*, 1 White & T. Lead. Cas. 481, 4th Am. ed. 679; 16 Cent. Law J. 242; 17 Cent. Law J. 1; *Swift v. Castle*, 23 Ill. 200, 222; *Jaques v. Methodist*, 3 Johns. Ch. 77, 113, overruled 17 Johns. Ch. 548, 578, 585; 8 Am. Dec. 447; *Yale v. Dederer*, 18 N. Y. 265, overruled 22 N. Y. 450; 68 N. Y. 329; *Ewing v. Smith*, 3 Desaus. 417, 462; *Young*, 7 Cold. 461, 467; *Radford v. Carwile*, 13 W. Va. 573, 578-635.

2 Elaborately maintained in *Radford v. Carwile*, 13 W. Va. 573, 578-635.

3 Elaborately maintained in *Ewing v. Smith*, 3 Desaus. 417, 462, *et seq.*

4 *Hulme v. Tenant*, 1 Brown Ch. 16; 2 Dick. 560; 1 White & T. Lead. Cas. 481, notes; *Pyons v. Smith*, 3 Brown Ch. 346; *Fettiplace v. Gorges*, 3 Brown Ch. 9; *Barford v. Street*, 16 Ves. 135; *Townuey v. Ward*, 1 Beav. 563; *Lechmore v. Brotheridge*, 32 Beav. 300; *Noble v. Willock*, Law R. 8 Ch. App. 778; *Pride v. Bubb*, Law R. 7 Ch. 64; *Adams v. Gamble*, 12 Ir. Ch. 102; 11 Ir. Ch. 269; *Crofts v. Middleton*, 8 DeGex, M. & G. 192; *Taylor v. Meads*, 4 DeGex, J. & S. 597; *Moore v. Morris*, 4 Drew. 38.

5 *Wilburn v. McCalley*, 63 Ala. 436, 447; *Gunter v. Williams*, 40 Ala. 561; *Paulk v. Wolfe*, 34 Ala. 541; *Booker*, 32 Ala. 473; *Caldwell v. Sawyer*, 30 Ala. 283; *Baker v. Gregory*, 28 Ala. 544; *Wells v. Bransford*, 28 Ala. 200; *Jenkins v. McConice*, 26 Ala. 213; *Ozley v. Ikelheimer*, 26 Ala. 332, 336; *McCrone v. Pope*, 17 Ala. 612; *Bradford v. Greenway*, 17 Ala. 797, 805; 52 Am. Dec. 203; *Puryear v. Beard*, 14 Ala. 122, 134; *Puryear*, 16 Ala. 486.

6 *Oswalt v. Moore*, 19 Ark. 257, 261; *Collins v. Underwood*, 33 Ark. 266; *Henry v. Blackburn*, 32 Ark. 445; *Dobbin v. Hubbard*, 17 Ark. 189.

7 *Miller v. Newton*, 23 Cal. 554; *Smith v. Greer*, 31 Cal. 476, 479.

8 *Imlay v. Huntington*, 20 Conn. 149, 175.

9 *Swift v. Costle*, 23 Ill. 200, 222; *Pomeroy v. Manhattan*, 40 Ill. 308, 402.

10 *Lillard v. Turner*, 16 Mon. B. 374, 376; *Burch v. Breckenridge*, 16 Mon. B. 482; *Sweeny v. Smith*, 15 Mon. B. 325; *Bell v. Kellar*, 13 Mon. B. 381; *Coleman v. Wooley*, 10 Mon. B. 320; *Jarman v. Wilkerson*, 7 Mon. B. 293; *Kelly*, 5 Mon. B. 369.

11 *Armstrong v. Kerns*, Md. L. Rec. Mar. 22, '84; *Hall v. Eccleston*, 37 Md. 510, 519; *Schull v. Murray*, 32 Md. 9, 15, 16; *Koontz v. Nabb*, 16 Md. 543, 555; *Chew v. Beall*, 13 Md. 348, 360; *Cooke v. Husbands*, 11 Md. 492, 504, 505.

12 *Coates v. Robinson*, 10 Mo. 757, 760; *Schafroth*, 46 Mo. 114, 116; *Miller v. Brown*, 47 Mo. 504, 508; 4 Am. Rep. 345; *Davis v. Smith*, 75 Mo. 219, 225; *Boatmen v. Collinson*, 75 Mo. 280, 281.

13 *Armstrong v. Ross*, 20 N. J. Eq. 109, 113; *Leaycraft v. Hedden*, 4 N. J. Eq. 512.

14 *Jaques v. Methodist*, 17 Johns. Ch. 548, 578, 585, overruling 3 Johns. Ch. 77, 113; 8 Am. Dec. 447; *Yale v. Dederer*, 22 N. Y. 450, 459; 68 N. Y. 329, overruling 18 N. Y. 265; *Yale v. Dederer*, 17 How. Pr. 46;

20 How. Pr. 242 ; 21 Barb. 286 ; 31 Barb. 525 ; Dyatt v. North, 20 Wend. 570, 573 ; Powell v. Murray, 2 Edw. 636, 643 ; Cruger, 5 Barb. 227, 268. Now partially regulated by 3 R. S. 1882, p. 2182, § 63 ; L'Amoureux v. Van Renselaer, 1 Barb. Ch. 34, 37 ; Rogers v. Ludlow, 3 Sand. 104, 108, 109.

15 Lightfort v. Boss, 8 Lea, 351, 354 ; Young, 6 Cold. 461, 467, *et seq.*, citing other cases. The older cases seem to recognize the other rule : Marshall v. Stephens, 8 Humph. 159, 173 ; 47 Am. Dec. 601 ; Morgan v. Elam, 4 Yerg. 375.

16 Hall v. Dotson, 55 Tex. 520, 524.

17 Burnett v. Hawpe, 25 Gratt. 481, 486 ; Muller v. Bailey, 21 Gratt. 523 ; Penn v. Whitehead, 17 Gratt. 503 ; Nixon v. Rose, 12 Gratt. 425.

18 Radford v. Carwile, 13 W. Va. 573, 575, 682 (1879), citing all the cases.

19 Todd v. Lee, 15 Wis. 365, 369 ; 16 Wis. 480, 483.

20 See cases cited *infra*, notes 23-33.

21 Wilburn v. McCalley, 63 Ala. 436, 447 ; Hahl v. Eccleston, 37 Md. 510, 519 ; Jaques v. Methodist, 17 Johns. Ch. 548, 600 ; 8 Am. Dec. 447 ; Burnett v. Hawpe, 25 Gratt. 481, 486 ; Radford v. Carwile, 13 W. Va. 573, 578 ; *post*, § 204.

22 Chew v. Beall, 13 Md. 348, 360 ; *post*, § 205.

23 Schull v. Murray, 32 Md. 9, 15, 16 ; *post*, § 203.

24 Shattock, Law R. 2 Eq. 182, 187 ; *post*, §§ 206, 207.

25 Radford v. Carwile, 13 W. Va. 573, 663, 663. See Armstrong v. Ross, 20 N. J. Eq. 109, 117 ; Lee v. Bank, 9 Leigh, 203, 206 ; McChesney v. Brown, 25 Gratt. 393, 404 ; *post*, §§ 206-208.

26 Nixon v. Rose, 12 Gratt. 425, 431, 432 ; *post*, § 204.

27 Radford v. Carwile, 13 W. Va. 573, 581, 602, 608, 682 ; *post*, §§ 206, 207.

28 Staley v. Hamilton, 19 Fla. 275, 296 ; Dollner v. Snow, 16 Fla. 86.

29 Dotey v. Mitchell, 9 Smedes & M. 435, 447 ; Montgomery v. Agricultural, 10 Smedes & M. 567, 576.

30 Hardy v. Holly, 84 N. C. 661, 668 ; Knox v. Jordan, 5 Jones Eq. 175.

31 Maurer, 86 Pa. St. 380, 385 ; Wright v. Brown, 44 Pa. St. 224, 238 ; Wells v. McCall, 64 Pa. St. 207 ; Rogers v. Smith 4 Pa. St. 93, 98 ; Lyne v. Crouse, 1 Pa. St. 111 ; Dominie v. Scott, 3 Whart. 309, 316 ; Thomas v. Folwell, 2 Whart. 11, 16 ; Wallace v. Caston, 9 Watts, 137, 138 ; Lancaster v. Dolan, 1 Rawle, 231, 248 ; 18 Am. Dec. 625.

32 Metcalf v. Cook, 2 R. I. 355, 363.

33 Creighton v. Clifford, 6 S. C. 188, 198 ; Ewing v. Smith, 3 Desaus. 417, 462 ; 5 Am. Dec. 557 ; Reed v. Lamar, 1 Strob. Eq. 27, 37 ; Rochell v. Tompkins, 1 Strob. Eq. 114, 121 ; Robinson v. Dart, Dud. Eq. 128, 131 ; Magwood v. Johnston, 1 Hill Ch. 228, 230 ; Trustees v. Center, 1 McCord Ch. 270, 275.

34 See Methodist v. Jaques, 3 Johns. Ch. 77, 113 ; 8 Am. Dec. 447 ; Morgan v. Elam, 4 Yerg. 375, 450 ; Gray v. Robb, 4 Heisk. 74, 77 ; Williamson v. Beckham, 8 Leigh, 20, 27.

35 Reed v. Lamar, 1 Strob. Eq. 27, 37 ; *post*, § 205.

36 West, 3 Rand. 173 ; *post*, § 203.

37 Creighton v. Clifford, 6 S. C. 188, 198 ; *post*, § 206, 207.

38 Clark v. Makenna, Cheves Eq. 163. This is not quite accurate : See *post*, §§ 206, 207.

39 *Scarborough v. Watkins*, 9 Mon. B. 540, 547; 50 Am. Dec. 528; *Methodist v. Jaques*, 3 Johns. Ch. 77, 86-114; 8 Am. Dec. 447. See *Norman*, 6 Bush, 495; *Albin v. Lord*, 39 N. H. 196; *ante*, § 42; *post*, § 212.

40 *Barron*, 24 Vt. 375, 398; *ante*, §§ 38, 42.

§ 204. **Restraints on alienation and anticipation.**—The power to dispose of property<sup>1</sup> and the liability thereof for debts<sup>2</sup> belong to ownership, and clauses in conveyances of ownership providing otherwise are void.<sup>3</sup> But such clauses in settlements to the separate use of married women, so long as they do not infringe on the rule against perpetuities,<sup>4</sup> are valid,<sup>5</sup> though this was at one time denied,<sup>6</sup> and are enforced in equity<sup>7</sup> as an additional protection to the wife,<sup>8</sup> although she be thus assisted in committing a fraud.<sup>9</sup> The settlor may limit her powers, or altogether take them away.<sup>10</sup> It is not necessary that the settlement contain technical words,<sup>11</sup> but only that the settlor's intent to prevent anticipation or alienation clearly appear<sup>12</sup> somewhere in the settlement.<sup>13</sup> A mere provision that the property shall be for her sole and separate use,<sup>14</sup> or paid to her *from time to time*<sup>15</sup> on her receipt<sup>16</sup> or personal appearance,<sup>17</sup> or exempt from her husband's debts,<sup>18</sup> are not restraints upon her powers of dominion and control.<sup>19</sup> But it is a valid restraint if her powers are to be exercised "so as in no way to deprive herself of the benefit thereof by way of anticipation,"<sup>20</sup> or "without power of anticipation,"<sup>21</sup> or "she shall not sell, mortgage, charge, or encumber,"<sup>22</sup> or "inalienable,"<sup>23</sup> or "unassignable";<sup>24</sup> so the restraint may be implied,<sup>25</sup> as when powers inconsistent with her power to alienate are given to her trustees,<sup>26</sup> or the property is settled on her "for a home,"<sup>27</sup> or she is to receive the rents, etc., "only as they become due,"<sup>28</sup> or the property is to be for her special use and remain in her possession during her life and on her death to go to her children; and

for "no other use whatever." <sup>29</sup> Whether an enumeration of certain powers is impliedly a denial of all others and is so far a restraint is much disputed.<sup>30</sup> On the one hand it is said that it is,<sup>31</sup> on the principle *expressio unius est exclusio alterius*,<sup>32</sup> and therefore that a power to will excludes a power to convey,<sup>33</sup> and *vice versa*,<sup>34</sup> and that a power to will in a certain mode excludes a power to will in any other;<sup>35</sup> though it is admitted that a power to dispose of absolutely includes a power to encumber or charge.<sup>36</sup> On the other hand, while it is admitted that if the settlement carries only a life estate with a certain power, as, for example, to will,<sup>37</sup> other powers, for example, to deed,<sup>38</sup> do not exist,<sup>39</sup> yet it is maintained that when an absolute estate is granted, the enumeration of powers simply enlarges and does not limit the grant.<sup>40</sup> The restraint is valid whether annexed to a settlement of realty or of personalty,<sup>41</sup> of an absolute or of a life estate;<sup>42</sup> and it applies generally though annexed to a power.<sup>43</sup> It cannot be discharged during coverture<sup>44</sup> even for the wife's benefit.<sup>45</sup> But it cannot exist apart from a separate estate,<sup>46</sup> and while it is valid though made on an unmarried woman,<sup>46</sup> it takes effect only on her marriage,<sup>48</sup> before which time she may exercise the powers of a *femme sole*;<sup>49</sup> so it ceases on her husband's death;<sup>50</sup> but it revives on a second marriage,<sup>51</sup> unless clearly confined to a particular coverture.<sup>52</sup> Property which she cannot alienate is not liable for her debts.<sup>53</sup> When there is a provision that she shall not mortgage her mortgage is void.<sup>54</sup> But a restraint on anticipating income does not affect her right to dispose of principal subject to the payment of said income.<sup>55</sup> Nor does a restraint on disposition prevent her enlarging her estate from a fee tail to a fee.<sup>56</sup> A restraint on anticipation does not affect her rights over

accrued income,<sup>57</sup> but it must be actually due before she can assign it, etc.;<sup>58</sup> nor if her husband has collected it will he be liable<sup>59</sup> otherwise than in other cases;<sup>60</sup> nor does it prevent her giving an order for future income revocable at pleasure;<sup>61</sup> nor does it prevent her adjustment of the amount of the principal with trustees;<sup>62</sup> nor does not prevent an advantageous lease;<sup>63</sup> but compensation for a breach of trust cannot be enforced against a fund limited by the same instrument to her separate use without power of anticipation.<sup>64</sup> It seems that there will be no implication of restraint against the exercise by the wife of powers which she has over her ordinary property by the common law,<sup>65</sup> or by statute.<sup>66</sup>

1 Jackson v. Methodist, 17 Johns. Ch. 543, 573, 535; *ante*, § 203.

2 Burnett v. Hawpe, 25 Gratt. 431, 436; *post*, §§ 206, 207.

3 De Peyster v. Michael, 6 N. Y. 467, 493. See McCleary v. Ellis, 51 Iowa, 311; 37 Am. Rep. 205; Maudlebaum v. McDonnell, 23 Mich. 73; 18 Am. Rep. 61.

4 Buckton v. Hay, 27 Week. R. 527, 528; Fry v. Capper, Kay, 163; Armitage v. Coates, 55 Beav. 1; Cunyngham, Law R. 11 Eq. 324; Teagues, Law R. 10 Eq. 564; 4 Kent Com. 267; Peachy Mar. Sett. 123.

5 Tullett v. Armstrong, 1 Beav. 1; 4 Mylne & C. 377, 393; Hulme v. Tenant, 1 Bro. Ch. 16; Pybus v. Smith, 3 Bro. Ch. 340, 346; Bagget v. Meux, 1 Colly. C. C. 133, 147, 148; Field v. Evans, 15 Sim. 372; Rowley v. Unwin, 2 Kay & J. 138, 142; Brettell, 2 DeGex, J. & S. 79, 82; Kenrick v. Wood, Law R. 9 Eq. 333, 337; Arnolds v. Woodhams, Law R. 16 Eq. 29, 33; Wilton v. Hill, 25 N. J. Eq. 156, 158; Cooper v. Macdonald, Law R. 7 Ch. D. 283, 294; Buckton v. Hay, 27 Week. R. 527, 553; Pike v. Fitzgibbon, 29 Week. R. 551, 552; Molyneux, 6 I. R. Eq. 411, 416; Hooks, 62 Ala. 253, 261; Wilburn v. McCalley, 63 Ala. 436, 447; Williams v. Maul, 20 Ala. 721, 723; Fears v. Brooks, 12 Ga. 195, 200; Freeman v. Flood, 16 Ga. 528, 534; Parker v. Converse, 5 Gray, 336, 338; Gully v. Hull, 31 Miss. 20, 30; Jaques v. Methodist, 3 Johns. Ch. 77, 113, 114; 8 Am. Dec. 447; Wells v. McCall, 64 Pa. St. 207, 213; Witsell v. Charleston, 7 S. C. 83, 104; Greensboro v. Chambers, 30 Gratt. 202, 209; Burnett v. Hawpe, 25 Gratt. 431, 436; Nixon v. Rose, 12 Gratt. 431; Radford v. Carwile, 13 W. Va. 572, 577, 632.

6 Jackson v. Hobhouse, 2 Mer. 482, 487; Wells v. McCall, 64 Pa. St. 207, 213, 214.

7 Buckton v. Hay, 27 Week. R. 527; *post*, § 210.

8 Jodrell, 9 Beav. 45, 53; Tullett v. Armstrong, 4 Mylne & C. 377, 393.

9 Arnolds v. Woodhams, Law R. 16 Eq. 29, 33. See *post*, § 224.

10 Tullett v. Armstrong, 1 Beav. 1, 34.

11 Ross, 1 Sim. N. R. 136, 199; Fears v. Brooks, 12 Ga. 195, 200, 201; Greensboro v. Chambers, 30 Gratt. 202, 210.

12 Pybus v. Smith, 3 Bro. Ch. 340, 346; Moore, 1 Colly. C. C. 54, 57; Doolan v. Blake, 3 Ir. Ch. N. S. 340, 349-351; Freeman v. Flood, 16 Ga. 523, 534.

13 Doolan v. Blake, 3 Ir. Ch. N. S. 340, 346; Fears v. Brooks, 12 Ga. 195, 201.

14 Pybus v. Smith, 3 Bro. Ch. 340, 346; 1 Ves. Jr. 189; Hulme v. Tenant, 1 Bro. Ch. 16.

15 Cooke v. Husbands, 11 Md. 492, 503.

16 Ellis v. Atkinson, 3 Bro. Ch. 565, 568; Browne v. Like, 14 Ves. 332; Sturgis v. Corp, 13 Ves. 190; Scott v. Davis, 4 Mylne & C. 87.

17 Ross, 1 Sim. N. R. 196, 199.

18 Witsell v. Charleston, 7 S. C. 88, 104.

19 Parker v. White, 11 Ves. 222; *ante*, § 203.

20 Cooper v. Macdonald, Law R. 7 Ch. D. 233, 294; Peachy Mar. Sett. 867, 868.

21 Doolan v. Blake, 3 Ir. Ch. N. S. 340, 349; Brown v. Bamford, 11 Sim. 131.

22 Bagget v. Meux, 1 Colly. C. C. 138, 147, 148.

23 D'Oechsner v. Scott, 24 Beav. 239; Spring v. Pride, 10 Jur. N. S. 876.

24 Rennie v. Ritchie, 12 Clark & F. 204.

25 Doolan v. Blake, 3 Ir. Ch. N. S. 340, 349-351; Parker v. Converse, 5 Gray, 336, 338.

26 Fears v. Brooks, 12 Ga. 195, 201; Gully v. Hull, 31 Miss. 20, 30.

27 Greensboro v. Chambers, 30 Gratt. 202, 209.

28 Doolan v. Blake, 3 Ir. Ch. N. S. 340, 350; Field v. Evans, 15 Sim. 375; Baker v. Bradley, 7 DeGex M. & G. 597; Jaques v. Methodist, 3 Johns. Ch. 77, 113, 114; 8 Am. Dec. 447.

29 Freeman v. Flood, 16 Ga. 523, 534.

30 Radford v. Carwile, 13 W. Va. 577, 590, 597, 653, 654, 682.

31 Cooke v. Husbands, 11 Md. 492, 503. S. P. Worsnop v. Benassi, 21 Week. R. 634, 635; Whistler v. Newman, 4 Ves. 129, 138; Weeks v. Sego, 9 Ga. 199, 203; Swift v. Castle, 23 Ill. 209, 218, 222; Armstrong v. Kerns, 12 Md. L. Rec. 23, March 22, 1884; Miller v. Williamson, 5 Md. 219, 235; Benesch v. Clark, 49 Md. 477, 504; Lowry v. Williamson, 2 Har. & G. 34, 40; Leayeraft v. Hedden, 4 N. J. Eq. 512, 550; Methodist v. Jaques, 3 Johns. Ch. 77, 113; 8 Am. Dec. 447; Hardy v. Holly, 84 N. C. 661, 666; Lightfoot v. Boss, 8 Lea, 350, 351, 352; Morgan v. Elam, 8 Yerg. 375; Williamson v. Beckham, 8 Leigh, 20, 27; Nixon v. Rose, 12 Gratt. 425, 431, 432; all cases which limit authority to power given, cited *ante*, § 203.

32 Weeks v. Sego, 9 Ga. 199, 203, 204.

33 Lowry v. Williamson, 2 Har. & G. 34, 40; Benesch v. Clark, 49 Md. 497, 504; *post*, § 205.

34 Methodist v. Jaques, 3 Johns. Ch. 77, 113; 8 Am. Dec. 447; *post*, § 203.

35 Weeks v. Sego, 9 Ga. 199, 203; *post*, § 203.

36 Jackson v. West, 22 Md. 71, 83; Hall v. Eccleston, 27 Md. 510, 520.

37 See Leigh v. Bank, 9 Leigh, 203, 208, 209, 213; *post*, § 203.

38 Williamson v. Beckham, 8 Leigh, 20, 25; *post*, § 205.

39 *Bradley v. Westcott*, 13 Ves. 445; *Anderson v. Dawson*, 15 Ves. 532; *Archibald v. Wright*, 7 Law J. Ch. 121; *Doe v. Thorley*, 10 East, 438; *Sockett v. Way*, 4 Bro. Ch. 483; *Moore*, 1 Colly. C. C. 84; *Holloway v. Clarksou*, 2 Hare, 521; *Harrup v. Howard*, 3 Hare, 624; *Medley v. Horton*, 14 Sim. 222.

40 *Radford v. Carwile*, 13 W. Va. 577, 590, 597, 682. *S. P. Taylor v. Meads*, 34 Law J. Ch. 203; *Hooks v. Brown*, 62 Ala. 258, 261; *Barford v. Street*, 16 Ves. 135; *Hixon v. Oliver*, 13 Ves. 108; *Kimm v. Weipert*, 46 Mo. 532, 536; 2 Am. Rep. 541; *Methodist v. Jaques*, 17 Johns. Ch. 548, 580, 585; 8 Am. Dec. 447; *Lee v. Bank*, 9 Leigh, 203, 208.

41 *Bagget v. Meux*, 1 Phill. Ch. 627, 628; 1 Colly. C. C. 138.

42 *Gaffee*, 14 Jur. 277; *Bagget v. Meux*, 1 Phill. Ch. 627, 628.

43 *Moore*, 1 Colly. C. C. 54, 58; *Harrup v. Howard*, 3 Hare, 624; *Harnett v. McDougall*, 8 Beav. 127; *Field v. Evans*, 15 Sim. 375; *Baker v. Bradley*, 7 DeGex. M. & G. 597; *Loring v. Salisbury*, 125 Mass. 138; *Kent v. Plumb*, 57 Ga. 207.

44 *Robinson v. Wheelwright*, 21 Beav. 214 c; *Keane*, 12 Law R. Eq. 115; *Wilton v. Hill*, 25 Law J. Ch. 156; *Derbshire v. Home*, 3 De Gex, M. & G. 113.

45 *Robinson v. Wheelwright*, 6 DeGex, M. & G. 535; 21 Beav. 214.

46 *Tullett v. Armstrong*, 4 Mylne & C. 377, 394; *Jones v. Salter*, 2 Russ. & M. 208.

47 *Molyneux*, 6 Ir. R. Eq. 411, 416; *Fears v. Brooks*, 12 Ga. 195, 200. But see *Wells v. McCall*, 64 Pa. St. 207, 213. Consult *ante*, §§ 193, 201.

48 *Molyneux*, 6 Ir. R. Eq. 411, 416.

49 *Tullett v. Armstrong*, 4 Mylne & C. 377, 394.

50 *Molyneux*, 6 Ir. R. Eq. 411, 416; *Tullett v. Armstrong*, 4 Mylne & C. 377, 395; *Jones v. Salter*, 2 Russ. & M. 208, 210; *Massey v. Parker*, 2 Mylne & K. 189; *post*, § 214.

51 *Tullett v. Armstrong*, 4 Mylne & C. 387, 399, 405; *Strathmore v. Bowers*, 1 Ves. Jr. 27; *Clayton v. Gresham*, 10 Ves. 287; *Sanger*, Law R. 11 Eq. 470; *Anderson*, 2 Mylne & K. 427; *Ellis*, Law R. 17 Eq. 409. *Contra*, *Wells v. McCall*, 64 Pa. St. 207, 214.

52 *Knight*, 6 Sim. 121; *Benson*, 6 Sim. 126.

53 *Pike v. Fltzgibbon*, 29 Week. R. 551, 552; *Radford v. Carwile*, 13 W. Va. 573, 662, *et seq.*; *post*, §§ 206, 207.

54 *Bagget v. Meux*, 1 Colles, 138, 147, 148.

55 *Cooper v. Macdonald*, Law R. 7 Ch. D. 288, 293, 294.

56 *Cooper v. Macdonald*, Law R. 7 Ch. D. 288, 294.

57 *Rowley v. Unwin*, 2 Kay & J. 138, 142.

58 *Brettell*, 2 DeGex, J. & S. 79, 82; *Jollands v. Burdett*, 10 Jur. N. S. 349.

59 *Rowley v. Unwin*, 2 Kay & J. 138, 142; *post*, §§ 209, 212.

60 That is, if he collects it only as agent or trustee he is liable: *Ante*, §§ 42, 84-88, 202; *post*, §§ 203, 212.

61 *Moore*, 1 Colly. C. C. 54, 57.

62 *Wilton v. Hill*, 25 Law J. Eq. 156, 158; *Derbshire v. Home*, 5 De Gex, M. & G. 113.

63 *Vandervoort v. Gould*, 36 N. Y. 639.

64 *Clive v. Carew*, 1 Johns. & H. 199; *Sheriff v. Butler*, 12 Jur. N. S. 323; *Davis v. Hodgson*, 25 Beav. 186.



65 Young, 7 Cold. 461, 477, 480, 482; *Lightfoot v. Boss*, 8 Lea, 350, 351. *Contra*, *Wright v. Brown*, 44 Pa. St. 224, 241; *Gray v. Robb*, 4 Heisk. 74, 77.

66 Young, 7 Cold. 461, 479; *post*, § 216.

§ 205. Wife's conveyances of her equitable separate estate.—The right of disposition—*jus disponendi*—is an ordinary incident of ownership,<sup>1</sup> of property real,<sup>2</sup> as well as personal,<sup>3</sup> and most of the States have applied this rule to a married woman's equitable separate estate when the settlement does not restrain her powers of disposition;<sup>4</sup> still, other States have denied the wife's right of disposition unless and except so far as given by the settlement.<sup>5</sup> When she can convey there is in general<sup>6</sup> no need of the joinder of her husband,<sup>7</sup> or trustee,<sup>8</sup> or of complying with married women acts;<sup>9</sup> she can convey to her husband as well as to a stranger,<sup>10</sup> and by way of mortgage,<sup>11</sup> or absolutely;<sup>12</sup> and the consideration may go to her husband or to herself.<sup>13</sup>

1. *What is a restraint or alienation.* Her right of disposition may be restrained by express words or by implication,<sup>14</sup> the main dispute being as to whether the enumeration of certain powers excludes all others<sup>15</sup>—whether, for example, giving her the power to will denies her the power to deed.<sup>16</sup>

2. *Conveyances under powers.* In some States a married woman can dispose of her equitable separate estate only under a power;<sup>17</sup> she merely executes a delegated authority,<sup>18</sup> and her grantee takes under the original settlement.<sup>19</sup> A general power to “dispose” includes all modes of alienation,<sup>20</sup> and a power to convey includes a power to mortgage.<sup>21</sup> In executing her power she acts as a *femme sole*.<sup>22</sup> No joinder of husband<sup>23</sup> or trustee,<sup>24</sup> and no privy examination,<sup>25</sup> is necessary. Still the joinder of the husband will do no harm,<sup>26</sup> unless it appears that she was not acting under the power,<sup>27</sup> and



the power may be so given as to require privy examination.<sup>28</sup> If the act is within the scope of the power, it is a good execution, though there be no reference to the power.<sup>29</sup> Still, in general, the power should be referred to,<sup>30</sup> or the intent to execute it should otherwise appear,<sup>31</sup> and this intent will be presumed only if the act would otherwise be meaningless,<sup>32</sup> and no other supposed authority is referred to.<sup>33</sup> Substantial compliance with the terms of the power is sufficient,<sup>34</sup> and an imperfect execution may be rectified in equity,<sup>35</sup>—private or conventional powers thus differing from statutory powers.<sup>36</sup> The rules apply to both realty and personalty,<sup>37</sup> and private powers may exist alongside of statutory ones.<sup>38</sup>

3. *Conveyances under natural jus disponendi.* Though the right to dispose of it is peculiarly an incident of ownership of personalty,<sup>39</sup> this right may be restrained by the settlement;<sup>40</sup> otherwise the wife may convey it away as if unmarried.<sup>41</sup> This applies equally to accumulations,<sup>42</sup> to personalty in possession or in reversion,<sup>43</sup> and to the rents and profits of real estate.<sup>44</sup> But it is in some States held that the wife's right of disposition does not apply to the corpus of her realty,<sup>45</sup> and that she can dispose of that only as a married woman,<sup>46</sup> by fine and recovery as at common law,<sup>47</sup> or under statutes allowing her to convey her general real estate,<sup>48</sup> or under a power.<sup>49</sup> Still, the general rule is that she can dispose of the corpus of her realty as well as of the rents and profits, unless restrained by the settlement;<sup>50</sup> and her husband need not join.<sup>51</sup>

1 American v. Wadhams, 10 Barb. 507, 601; Lee v. Bank, 9 Leigh, 203, 206; *ante*, § 203.

2 Taylor v. Meads, 4 DeGex, J. & S. 507, 607; Jaques v. Methodist, 17 Johns. Ch. 548, 578, 585; 8 Am. Dec. 447; *infra*, n. 45.

3 Fettiplace v. Gorges, 3 Bro. Ch. 8; 1 Ves. Jr. 46; American v. Wadhams, 10 Barb. 507, 601; *infra*, n. 39.

- 4 Taylor v. Mead, 4 DeGex, J. & S. 537, 607; Chew v. Beall, 13 Md. 348, 360; Finch v. Marks, 76 Va. 207, 209; *ante*, §§ 203, 204.
- 5 Reed v. Lamar, 1 Strob. Eq. 27, 37; *ante*, § 203.
- 6 Aliter in particular cases, such as Richardson v. Pulver, 63 Barb. 67, 72.
- 7 Thompson v. Murray, 2 Hill Ch. 204, 211; 29 Am. Dec. 68; *infra*, notes 23, 51; *post*, § 212.
- 8 Trippe v. John, 15 Ala. 117, 124; *infra*, n. 24; *ante*, § 202.
- 9 Sherman v. Turpin, 7 Cold. 382, 384. See *post*, §§ 394-408.
- 10 Booker, 32 Ala. 473, 478. See Hearle v. Greenbank, 1 Ves. Sr. 298; Pawlet v. Delaval, 2 Ves. Sr. 173; Sperling v. Rochford, 8 Ves. 164, 183; Essex v. A'kins, 14 Ves. 542; Wood, Law R. 10 Eq. 220; *ante*, § 42.
- 11 Jones v. Reese, 65 Ala. 134, 141; Price v. Bigham, 7 Har. & J. 296, 318; Jackson v. West, 22 Md. 71, 83; Hall v. Eccleston, 37 Md. 510, 520; American v. Wadhams, 10 Barb. 597, 604; Maurer, 86 Pa. St. 380, 385; Porcher v. Daniel, 12 Rich. Eq. 349, 359; Bain v. Buff, 76 Va. 371, 374.
- 12 Porcher v. Daniel, 12 Rich. Eq. 349, 359; Radford v. Carwile, 13 W. Va. 573, 669.
- 13 Ferdon v. Miller, 34 N. J. Eq. 10, notes; *ante*, § 134.
- 14 Doolan v. Blake, 3 Ir. Ch. N. S. 340, 349; *ante*, § 204.
- 15 Pro. Cooke v. Husbands, 11 Md. 492, 503. *Contra*, Radford v. Carwile, 13 W. Va. 573, 590, 597, 682. Discussed *ante*, § 204.
- 16 Benesch v. Clark, 49 Md. 497, 504; *ante*, § 204.
- 17 Lyne v. Crouse, 1 Pa. St. 111, 115; *ante*, § 203.
- 18 Porcher v. Daniel, 12 Rich. Eq. 349, 357.
- 19 Leigh v. Smith, 3 Ired. Eq. 442, 446; 42 Am. Dec. 182.
- 20 American v. Wadhams, 10 Barb. 597, 604; Porcher v. Daniel, 12 Rich. Eq. 349, 357.
- 21 Price v. Bigham, 7 Har. & J. 296, 318; *supra*, n. 11.
- 22 Armstrong v. Kerns, Md. L. Rec. Mar. 22, 1884, Ct. App. Oct. '83. See Vaughan v. Vanderstegen, 2 Drew. 165, 185; Heath v. Withington, 6 Cush. 497, 506; 1 Sugden Pow. 181, 183.
- 23 Thompson v. Murray, 2 Hill Ch. 201, 211; 4 Kent Com. 324; 2 Bish. M. W. § 189; 1 Sugden Pow. 181, 183.
- 24 Burnett v. Hawpe, 25 Gratt. 481, 487; 2 Story Eq. Juris. § 1390; 2 Bish. M. W. § 194; *ante*, § 202.
- 25 Sherman v. Turpin, 7 Cold. 382, 384.
- 26 Witts v. Dawkins, 12 Ves. 501, 502.
- 27 Myers v. McBride, 13 Rich. 178, 190.
- 28 Richardson v. Pulver, 63 Barb. 67, 72.
- 29 Coryell v. Dunton, 7 Pa. St. 530, 532; 49 Am. Dec. 489.
- 30 Vaughan v. Vanderstegen, 2 Drew. 165, 183; *infra*, n. 31.
- 31 Davis v. Vincent, 1 Houst. 416, 426; White v. Hicks, 33 N. Y. 383, 389; Keifer v. Schwartz, 47 Pa. St. 503, 508; Porcher v. Daniel, 12 Rich. Eq. 349, 368; Thorndike v. Reynolds, 22 Gratt. 21, 32.
- 32 Churchill v. Dibben, 9 Sim. 447, note; Porcher v. Daniel, 12 Rich. Eq. 349, 351.
- 33 See Myers v. McBride, 13 Rich. 178, 190.

- 34 *Rowe v. Beckett*, 30 Ind. 154, 163
- 35 *Wright v. Englefield*, Amb. 468, 473; *Ellet v. Wade*, 47 Ala. 456, 464; *Clayton v. Frazier*, 33 Tex. 91, 100.
- 36 *Trustee v. Davison*, 65 Ill. 124, 126; *Lindley v. Smith*, 46 Ill. 523; *Heaton v. Tryberger*, 38 Iowa, 185, 190; *O'Ferrall v. Simplot*, 4 Greene, 162; 4 Iowa, 381; *Wills v. Gattman*, 53 Miss. 722, 732; *Silliman v. Cummings*, 13 Ohio, 118, 118. Compare *Kilbourn v. Fury*, 26 Ohio St. 153, 160; *Clayton v. Frazier*, 33 Tex. 91, 100. See *post*, §§ 404, 407.
- 37 *Gulse v. Small*, 1 Anstr. 277, 278; *Warren v. Postelthwaite*, 2 Colly. C. C. 103, 118; *Newburyport v. Stone*, 13 Pick. 420, 423; *American v. Wadhams*, 10 Barb. 597, 606.
- 38 *Armstrong v. Kerns*, Md. L. Rec. Mar. 22, 1884, 63 Md. 522; *post*, § 216.
- 39 *Naylor v. Field*, 29 N. J. L. 237, 238. But see *Moore v. Cornell*, 78 Pa. St. 320.
- 40 *Fettiplace v. Gorges*, 3 Bro. Ch. 9, 10; cases *infra*, n. 41; *ante*, § 204.
- 41 *Fettiplace v. Gorges*, 1 Ves. Jr. 43; 3 Bro. Ch. 9, 10; *Bank v. Lempriere*, Law J. 4 P. C. 572; *Pride v. Bobb*, Law R. 7 Ch. App. 64; *Noble v. Whillock*, Law R. 8 Ch. App. 778; *Hulme v. Tenant*, 1 Bro. Ch. 16; *Hanchet v. Briscoe*, 22 Beav. 496; *Bestall v. Bemberry*, 13 Ir. Ch. 549; *Hearle v. Greenbank*, 3 Atk. 700; 1 Ves. Sr. 238, 303; *Pomeroy v. Manhattan*, 40 Ill. 308; *Harding v. Cobb*, 47 Miss. 549, 603; *Dibnell v. Carlisle*, 48 Miss. 691; *Naylor v. Field*, 29 N. J. L. 237, 238; *Green v. Ballas*, 13 N. J. Eq. 267; *Lee v. Bank*, 9 Lee, 205, 207; *Penn v. Whitehead*, 17 Gratt. 503.
- 42 *Gold v. Rutland*, 1 Eq. Ca. Abr. 346; *Gore v. Knight*, 2 Vern. 535; *Newland v. Paynter*, 10 Sim. 377; *Humphrey v. Richards*, 2 Jur. N. S. 432.
- 43 *Sturgis v. Corp*, 13 Ves. 190; *Donne v. Hart*, 2 Russ. & M. 355, 360; *Headen v. Rasher*, McClel. & Y. 89.
- 44 *Cheever v. Wilson*, 9 Wall. 108, 119; *McChesney v. Brown*, 25 Gratt. 333, 404. See *Hulme v. Tenant*, 1 Bro. Ch. 16; 1 White & T. Lead. Cas. 481, 4th Am. ed. 679; *post*, § 203.
- 45 *Radford v. Carwile*, 13 W. Va. 573, 669. *S. P. Armstrong v. Ross*, 29 N. J. Eq. 100, 117; *Naylor v. Field*, 29 N. J. L. 237, 238; *McChesney v. Brown*, 25 Gratt. 393, 404; *Hawley v. Troyman*, 29 Gratt. 728, 729. So formerly in England: *Peacock v. Monk*, 2 Ves. Jr. 190; *Doe v. Scott*, 4 Blig. 505; *Moore v. Morris*, 4 Drew. 38; *Harris v. Mott*, 14 Beav. 169; *Churchill v. Debben*, 2 Keny. (II. Pt.) 63, 84. See 1 Bish. M. W. § 351, note.
- 46 *Young*, 7 Cold. 461, 477; *infra*, notes 47-49; *post*, §§ 394-408.
- 47 *Dillon v. Grace*, 2 Schoales & L. 456, 462-464; *Wright v. Cadogan*, 2 Eden, 239, 257-259.
- 48 *Taylor v. Meads*, 4 DeGex, J. & S. 597, 607; *Young*, 7 Cold. 461, 479; *Lightfoot v. Boss*, 8 Lea, 350, 351; *Radford v. Carwile*, 13 W. Va. 573, 669.
- 49 *McChesney v. Brown*, 25 Gratt. 333, 404; *Radford v. Carwile*, 13 W. Va. 573, 670; *supra*, notes 17-38.
- 50 *Appleton v. Rawley*, Law R. 8 Eq. 133, 142; *Taylor v. Meads*, 34 Law J. N. S. Ch. 203, 207; *Trontbeck v. Boughey*, Law R. 3 Eq. 534, 537; *Hodsden v. Staple*, 2 Term R. 684, 695; *Parkes v. White*, 11 Ves. 209, 220; *Chew v. Beall*, 13 Md. 348, 360; *Bradish v. Gibbs*, 3 Johns. Ch. 523, 539-541.
- 51 *Moore v. Webster*, Law R. 3 Eq. 267, 369; *American v. Wadhams*, 10 Barb. 597, 602; *supra*, n. 9.

§ 206. **Wife's contracts concerning her equitable separate estate.**—Independently of statute, a married woman has generally no capacity to make a contract;<sup>1</sup> her promises, deeds, etc., are absolutely void,<sup>2</sup> even in courts of equity.<sup>3</sup> But her contracts relating to her estate may be so made as to be sustainable in equity against her equitable separate estate<sup>4</sup> (and her statutory separate estate as well<sup>5</sup>) in a proceeding *in rem*.<sup>6</sup> Thus, her contract to sell her equitable separate estate is valid,<sup>7</sup> and even if not enforceable against her specifically, if she has received the purchase money the property is liable for its repayment;<sup>8</sup> and a contract, in consideration of a loan, to pay it back, and to give a mortgage for it on her equitable separate estate, may be enforced as an equitable mortgage.<sup>9</sup> That is to say, any contract charging her equitable separate property for the payment of money may be enforced against such property, and such contracts may be made through any one,<sup>10</sup> including her husband, as her agent.<sup>11</sup> Though a married woman's capacity to contract with reference to her equitable separate property has always been recognized to some extent,<sup>12</sup> the reasons for and limits of this capacity are not clearly determined,<sup>13</sup> and different rules relating thereto have prevailed at different times and in different places.<sup>14</sup> One theory has been that her contracts are enforceable against her property as equitable appointments, mortgages, or conveyances thereof,<sup>15</sup> on the ground that her power to dispose includes a power to encumber,<sup>16</sup> and that private powers need not be strictly executed to create valid appointments.<sup>17</sup> Under this theory only express charges would be enforceable,<sup>18</sup> and no oral charge would have any effect as to real estate.<sup>19</sup> Since, as to these matters, the weight of the law is otherwise, and for other reasons, this theory has of late met with

much disfavor,<sup>20</sup> though it is the only one possible where, although the wife has only such powers over her estate as are expressly given her, such estate is held liable for contracts which are not expressly authorized.<sup>21</sup> Another more satisfactory theory has been accepted in States where a married woman is, as to her equitable separate estate, a *femme sole*;<sup>22</sup> namely, that it is an incident of ownership that property should be liable for its owner's debts,<sup>23</sup> or at all events an incident of the *jus disponendi*,<sup>24</sup> and that the liability of equitable separate property for her debts is a consequence of the fact that the married woman is in equity absolute owner thereof.<sup>25</sup> There are some rules as to the liability aforesaid upon which there seems to be some general agreement.

1. It is not liable unless the wife has the *jus disponendi*.<sup>26</sup> Thus, when she has only a life estate the reversion is not liable;<sup>27</sup> when she cannot dispose of the corpus of her land, only the rents and profits are liable;<sup>28</sup> and when she cannot dispose of it at all,<sup>29</sup> it is not liable at all.<sup>30</sup>

2. It is not liable when no credit is given to it,<sup>31</sup> as when the credit is given to the husband,<sup>32</sup> and in the case of household expenses the credit is presumed to have been given to the husband.<sup>33</sup>

3. It is not liable when there is no consideration; the wife is not estopped in equity by her seal.<sup>34</sup> Still, usually, the consideration need not benefit her.<sup>35</sup>

4. It is liable if expressly charged,<sup>36</sup> as to this all agree,<sup>37</sup> and the intention need not be expressed in the contract,<sup>38</sup> or in writing.<sup>39</sup>

5. It is liable if impliedly charged.<sup>40</sup> The intent to charge may, except in North Carolina,<sup>41</sup> be proved by circumstantial evidence.<sup>42</sup> In many courts, to prevent the implication of a fraudulent intent in the married

woman at the time she contracted her debts not to pay them, the law raises a presumption that she intended to pay them in the only way possible, namely, out of her separate property;<sup>43</sup> and such courts hold her property *prima facie* liable on all her contracts, on the doctrine of implied intent.<sup>44</sup> This presumption may be rebutted by showing that neither party had in mind payment out of her estate.<sup>45</sup> Very rarely, however, is this liability said to be independent of express or implied intent to charge,<sup>46</sup> as it is in Virginia.<sup>47</sup> Some courts which recognize implied charges refuse to raise the implication from the mere fact of coverture.<sup>48</sup>

6. It is liable for a debt incurred for its preservation, or for some purpose connected necessarily with its full enjoyment.<sup>49</sup> Other courts have extended this principle, and hold the estate liable whenever the contract benefits it or the married woman,<sup>50</sup> on the ground, it seems, of implied intent.<sup>51</sup> Others, on the other hand, do not hold it liable even for improvements on it, if there is no express or implied charge.<sup>52</sup> A few courts refuse to hold it liable for a debt not for its benefit, even on a charge.<sup>53</sup>

7. It is liable on contracts in relation to it,<sup>54</sup> or on the faith and credit of it.<sup>55</sup>

But the only satisfactory way of determining the law in each particular State is to examine the decisions therein.<sup>56</sup>

1 Discussed fully, *post*, CONTRACTS OF MARRIED WOMEN, §§ 353, *et seq.*

2 *Gebb v. Rose*, 40 Md. 387, 393; *post*, § 357.

3 *Vaughan v. Vanderstegen*, 2 Drew. 165, 184; *Miller v. Newton*, 23 Cal. 554, 564; *Davis v. Smith*, 75 Mo. 219, 224; *post*, § 359.

4 *Hulme v. Tenant*, 1 White & T. Lead. Cas. 481, notes.

5 *Hall v. Eccleston*, 37 Md. 510, 520; *Radford v. Carwile*, 13 W. Va. 573, 661; *post*, § 234.

6 *Vaughan v. Vanderstegen*, 2 Drew. 165, 184; *Smith v. Gooch*, 86 N. C. 276.

7 *Stead v. Nelson*, 2 Beav. 245, 248; *post*, § 407.

8 Girault v. Adams, 61 Md. 1, 12, 13; Shnyder v. Noble, 94 Pa. St. 236, 239; *post*, § 407.

9 Stead v. Nelson, 2 Beav. 245, 248; Wainwright v. Hardisty, 2 Beav. 363, 365; Hall v. Eccleston, 37 Md. 510, 520; Cooke v. Husbands, 11 Md. 492, 508.

10 Garland, 1 Mackey, 496; Taylor v. Shelton, 30 Conn. 122, 128; Wells v. Thorman, 37 Conn. 313; Crickmore v. Breckenridge, 51 Ind. 294, 297; Girault v. Adams, 61 Md. 1, 11, 12; Merrill v. Parker, 112 Mass. 250; *ante*, §§ 84-88. But see Jones v. Aetna, 14 Conn. 501, 509.

11 Crickmore v. Breckenridge, 51 Ind. 294, 297; *post*, §§ 364, 406.

12 Hulme v. Tenant, 1 White & T. Lead. Cas. 481, notes.

13 Compare Yale v. Dederer, 18 N. Y. 265, and S. C. 22 N. Y. 450.

14 Compare Clark v. Miller, 2 Atk. 379, 380, and Murray v. Barlee, 3 Mylne & K. 209, 223; Wilson v. Jones, 48 Md. 349, 358, and Henry v. Blackburn, 32 Ark. 445, 451; Orange v. Traver, 7 Sawy. 210, 216, and Hodson v. Davis, 43 Ind. 258, 264. See *post*, § 207.

15 Stuart v. Kirkwall, 3 Mod. 387, 389; Vaughan v. Vanderstegen, 2 Drew. 165, 181; McHenry v. Davies, Law R. 10 Eq. 88, 92; Bolton v. Williams, 2 Ves. Jr. 133, 142; Whistler v. Newman, 4 Ves. 129, 145; Hulme v. Tenant, 1 Bro. Ch. 16; 1 White & T. Lead. Cas. 481, notes.

16 American v. Wadhams, 10 Barb. 597, 603; *ante*, § 205.

17 Ellet v. Wade, 47 Ala. 456, 464; Hall v. Eccleston, 37 Md. 510, 520; *ante*, § 205; *post*, § 407.

18 Knox v. Jordan, 5 Jones Eq. 175, 176. Nearly every where intent to charge may be implied; Miller v. Newton, 23 Cal. 554, 561; Yule v. Dederer, 22 N. Y. 451, 459.

19 Clark v. Miller, 2 Atk. 379, 380; Burch v. Breckenridge, 16 Mon. B. 482, 487. Writing generally held not necessary; Murray v. Barlee, 3 Mylne & K. 209, 223; London v. Lempriere, Law R. 4 P. C. 572, 591; Matthewson, Law R. 3 Eq. 781, 787; Shattuck, Law R. 2 Eq. 182, 187; Vaughan v. Vanderstegen, 2 Drew. 165, 183; Ozley v. Ikellheimer, 26 Ala. 332; Miller v. Newton, 23 Cal. 564, 566; Girault v. Adams, 61 Md. 1, 13; Miller v. Brown, 47 Mo. 504, 510; 4 Am. Dec. 345; Radford v. Carwile, 13 W. Va. 573, 635.

20 Vaughan v. Vanderstegen, 2 Drew. 165, 181.

21 Knox v. Jordan, 5 Jones Eq. 175, 176; Creighton v. Clifford, 6 S. C. 188, 198. See *ante*, § 204.

22 Dallas v. Heard, 32 Ga. 604, 607; *ante*, § 204.

23 Owens v. Dickinson, 1 Craig & P. 48; Vaughan v. Vanderstegen, 2 Drew. 165, 183; Dallas v. Heard, 32 Ga. 604, 607.

24 Bain v. Buff, 76 Va. 371, 374.

25 Vaughan v. Vanderstegen, 2 Drew. 165, 182, 183, 185; Shattock, Law R. 2 Eq. 182, 189; *ante*, § 204.

26 Aylett v. Ashton, 1 Mylne & C. 105, 111; Shattock, Law R. 2 Eq. 182, 189; Buckner v. Davis, 29 Ark. 447; Radford v. Carwile, 13 W. Va. 573, 674.

27 Shattock, Law R. 2 Eq. 182, 189, 190.

28 McChesney v. Brown, 25 Gratt. 393, 401; *ante*, § 205.

29 Radford v. Carwile, 13 W. Va. 573, 674, 680; *post*, § 211.

30 Clark v. Makenna, Cheves Eq. 163; *ante*, §§ 204, 205.

31 Matthewman, Law R. 3 Eq. 781, 787; Staley v. Hamilton, 19 Fla. 275, 297.



- 32 Matthewman, Law R. 3 Eq. 781, 787.
- 33 Powers v. Russell, 26 Mich. 179, 184; *post*, § 487; *ante*, § 94.
- 34 Radford v. Carwile, 13 W. Va. 573, 683.
- 35 *Ante*, § 134. *Contra*, Perkins v. Elliott, 23 N. J. Eq. 526, 535.
- 36 A charge is an equitable mortgage: First v. Haire, 36 Iowa, 443, 446; Harrison v. Stewart, 18 N. J. Eq. 451. See *ante*, § 205.
- 37 Yale v. Dederer, 18 N. Y. 265, 283.
- 38 Miller v. Newton, 23 Cal. 554, 564; Koontz v. Nobb, 16 Md. 549, 554; Wilson v. Jones, 46 Md. 349, 357; Girault v. Adams, 61 Md. 1, 13; Bank v. Miller, 63 N. Y. 639.
- 39 Murray v. Barlee, 3 Mylne & K. 203, 223; *supra*, n. 19.
- 40 Greatly v. Nolte, 3 Mod. 77, 94; Shattock, Law R. 2 Eq. 182, 193; Miller v. Newton, 23 Cal. 554, 564; Patton v. Kinsman, 17 Iowa, 428, 433; Pond v. Carpenter, 12 Minn. 430, 432; Yale v. Dederer, 22 N. Y. 451, 459; Finch v. Marks, 76 Va. 207, 210.
- 41 Knox v. Jordan, 5 Jones Eq. 175, 176.
- 42 Miller v. Newton, 23 Cal. 564, 564; West v. Jackson, 22 Md. 71, 76, 84.
- 43 Miller v. Newton, 23 Cal. 554, 564; Jones v. Ætna, 14 Conn. 501, 509; Bell v. Killar, 13 Mon. B. 443, 446; Boatman v. Collins, 75 Mo. 280, 281; Batchelder v. Sargent, 47 N. H. 262, 265; Phillips v. Graves, 20 Ohio St. 371, 390; 5 Am. Rep. 675; Orange v. Traver, 7 Sawy. 210, 215, 216.
- 44 Phillips v. Graves, 20 Ohio St. 371, 390; 5 Am. Rep. 675.
- 45 Kimm v. Weippert, 46 Mo. 532; 2 Am. Rep. 541.
- 46 Even in England the doctrine seems to require some fact from which intent may be implied: London v. Lempriere, Law R. 4 P. C. 572, 593; Johnson v. Gallagher, 2 DeGex F. & J. 494, 514; Jones v. Harris, 9 Ves. 485, 497, 498.
- 47 Burnett v. Hawpe, 25 Gratt. 481, 486; Radford v. Carwile, 13 W. Va. 573, 581, 602, 608.
- 48 See Jones v. Harris, 9 Ves. 485, 497, 498; Staley v. Hamilton, 19 Fla. 275, 297; Shannon v. Bartholemew, 53 Ind. 54, 56; Patton v. Kinsman, 17 Iowa, 428, 433; Jackson v. West, 22 Md. 71, 76, 84; Wilson v. Jones, 46 Md. 349, 357, 358; Devries v. Conklin, 22 Mich. 255, 259; Pond v. Carpenter, 12 Minn. 430, 432; Johnson v. Cummings, 16 N. J. Eq. 97, 104; Yale v. Dederer, 22 N. Y. 451, 459; 68 N. Y. 329; Partridge v. Stocker, 36 Vt. 108, 117.
- 49 London v. Lempriere, Law R. 4 P. C. 572, 594; Crickmore v. Breckenridge, 51 Ind. 234, 239; Batchelder v. Sargent, 47 N. H. 262, 266; Montgomery v. Eyeleigh, 1 McCord Ch. 267, 269; Magwood v. Johnson, 1 Mill Eq. 228, 230, 231.
- 50 Collins v. Underwood, 33 Ark. 265, 266; Staley v. Hamilton, 19 Fla. 275, 298; Williams v. Ingunin, 69 Ill. 214, 217; 18 Am. Rep. 607; Willard v. Eastham, 15 Gray, 328, 335; Batchelder v. Sargent, 47 N. H. 262, 266; McVey v. Cantrell, 70 N. Y. 295, 298; 26 Am. Rep. 605; Yale v. Dederer, 22 N. Y. 451, 459, 460; Frazier v. Brownslow, 3 Ired. Eq. 237; 42 Am. Dec. 165; Partridge v. Stocker, 36 Vt. 108, 117; Radford v. Carwile, 13 W. Va. 573, 611; 1 Bish. M. W. § 875.
- 51 Orange v. Traver, 7 Sawy. 210, 216; Henry v. Blackburn, 32 Ark. 445, 451.
- 52 Shannon v. Bartholemew, 53 Ind. 54, 56; Wilson v. Jones, 46 Md. 349, 357, 358. *Contra*, Henry v. Blackburn, 32 Ark. 445, 451.



53 *Williams v. Hugunin*, 65 Ill. 214, 217; 18 Am. Rep. 607; *Perkins v. Elliott*, 23 N. J. Eq. 526, 535; *ante*, § 134.

54 *London v. Lempriere*, Law R. 4 P. C. 572, 594; *Collins v. Underwood*, 33 Ark. 265, 266; *post*, § 373.

55 *Staley v. Hamilton*, 19 Fla. 275, 298; *Williams v. Hugunin*, 69 Ill. 214, 217; 18 Am. Rep. 607; *Orange v. Traver*, 7 Sawy. 210, 216; *Bryan*, 18 Tex. 461, 465, 467; *Todd v. Lee*, 15 Wis. 365, 361; 16 Wis. 480, 483.

56 *Stuart v. Kirkwall*, 3 Mod. 387, 389; *McHenry v. Davies*, Law R. 10 Eq. 83, 92; *Johnson v. Cummings*, 16 N. J. Eq. 97, 104; *post*, § 207.

§ 207. **Wife's power to contract concerning her equitable separate estate—Decisions.**—The decisions as to the wife's contracts concerning her equitable separate estate are inharmonious—both those in the different States and those in the same State.<sup>1</sup> Broadly, it may be said, that it is liable on all contracts in which the credit was not given to the husband,<sup>2</sup> in the following States: England,<sup>3</sup> Alabama,<sup>4</sup> Arkansas,<sup>5</sup> California,<sup>6</sup> Connecticut,<sup>7</sup> Georgia,<sup>8</sup> Kansas,<sup>9</sup> Kentucky,<sup>10</sup> Mississippi,<sup>11</sup> Missouri,<sup>12</sup> New Hampshire,<sup>13</sup> Ohio,<sup>14</sup> Oregon,<sup>15</sup> Texas,<sup>16</sup> Virginia,<sup>17</sup> West Virginia,<sup>18</sup> and Wisconsin.<sup>19</sup> In the following States there must be some reference to the said estate—some express pledge of it or some circumstances beside the fact of coverture from which an intent to pledge it may be inferred: Florida,<sup>20</sup> Illinois,<sup>21</sup> Indiana,<sup>22</sup> Iowa,<sup>23</sup> Maryland,<sup>24</sup> Massachusetts,<sup>25</sup> Michigan,<sup>26</sup> Minnesota,<sup>27</sup> New Jersey,<sup>28</sup> New York,<sup>29</sup> and Vermont.<sup>30</sup> In the following States, though it may be liable for expenses necessarily attached to it,<sup>31</sup> it is not liable for the wife's contracts unless they come within the scope of the powers given her by the settlement: North Carolina,<sup>32</sup> Pennsylvania,<sup>33</sup> Rhode Island,<sup>34</sup> and South Carolina.<sup>35</sup> Florida,<sup>36</sup> Mississippi,<sup>37</sup> and Tennessee,<sup>38</sup> which also once held the South Carolina rule<sup>39</sup> seem in this connection to have abandoned it.<sup>40</sup> In California a statute formerly required the contracts to be in writing.<sup>41</sup>

<sup>1</sup> *Hulme v. Tenant*, 1 White & T. Lead Cas. 481, and notes; *ante*, § 207.

<sup>2</sup> *Matthewman*, Law R. 3 Eq. 781, 787; *ante*, § 207.

3 *London v. Lempriere*, Law R. 4 P. C. 572, 594 (1873); *Butler v. Cumpston*, Law R. 7 Eq. 16, 20, 21; *Matthewman*, Law R. 3 Eq. 751, 787; *Shattock*, Law R. 2 Eq. 182, 187; *Picard v. Hine*, Law R. 5 Ch. App. 274; *Johnson v. Gallagher*, 3 DeGex. F. & J. 494, 514; *Murray v. Barlee*, 3 Mylne & K. 209, 223; *Vaughan v. Vanderstegen*, 2 Drew. 165, 180; *Hulme v. Tenant*, 1 Bro. Ch. 16; 1 *White & T. Lead. Cas.* 48, 4th Am. Ed. 679, collecting cases.

4 *Wilburn v. McCalley*, 63 Ala. 436, 447; *McKenna v. Rowlett*, 68 Ala. 186; *Braune v. McGee*, 50 Ala. 359, 363; *Short v. Battle*, 52 Ala. 456; *Cowles v. Pollard*, 51 Ala. 445; *Nunn v. Givhan*, 45 Ala. 375; *Wilkinson v. Cbeatham*, 45 Ala. 341; *Cowles v. Morgan*, 34 Ala. 535; *Paulk v. Wolfe*, 34 Ala. 541; *Gunter v. Williams*, 40 Ala. 521; *Baker v. Gregory*, 28 Ala. 544; *Ozley v. Ikelheimer*, 26 Ala. 332, 338; *Collins v. Rudolf*, 19 Ala. 616; *Puryear*, 16 Ala. 486.

5 *Collins v. Underwood*, 33 Ark. 265, 266; *Henry v. Blackburn*, 32 Ark. 445, 451; *Pulmer v. Rankin*, 30 Ark. 771; *Buckner v. Davis*, 29 Ark. 447; *Stillwell v. Adams*, 29 Ark. 346; *Oswalt v. Moore*, 19 Ark. 257; *Dobbin v. Hubbard*, 17 Ark. 189, 196.

6 *Miller v. Newton*, 23 Cal. 554, 564. Must be in writing: *MacLay v. Love*, 25 Cal. 367, 381; *Booley v. Furguson*, 30 Cal. 511; *Smith v. Greer*, 31 Cal. 476, 479.

7 *Jones v. Etna*, 14 Conn. 501, 509; *Taylor v. Shelton*, 30 Conn. 122, 127; *Leavitt v. Beirne*, 21 Conn. 1; *Inlay v. Huntington*, 20 Conn. 146, 173; *Platt v. Hawkins*, 43 Conn. 143; *Wells v. Thorman*, 37 Conn. 318; *Buckingham v. Moss*, 40 Conn. 461.

8 *Fears v. Brooks*, 12 Ga. 195, 200; *Carmichael v. Walters*, 33 Ga. 316, 328; *Dallas v. Heard*, 32 Ga. 601, 607; *Morrison v. Solomon*, 52 Ga. 206; *Seabrook v. Brady*, 47 Ga. 650; *Van Arsdale v. Joiner*, 41 Ga. 41; *Huff v. Wright*, 39 Ga. 41; *Roberts v. West*, 15 Ga. 123; *Wylly v. Collins*, 9 Ga. 223; *Weeks v. Sego*, 4 Ga. 201.

9 *Wicks v. Mitchell*, 9 Kan. 80, 87, 89; *Deering v. Boyle*, 8 Kan. 529; *Knags v. Maston*, 9 Kan. 532.

10 *Burch v. Breckenridge*, 16 Mon. B. 482, 487; *Bell v. Kellar*, 13 Mon. B. 381, 383, 385; *Lillard v. Turner*, 16 Mon. B. 374, 375; *Coleman v. Wooley*, 10 Mon. B. 320; *Jarmen v. Wilkeson*, 7 Mon. B. 293; *Sweeney v. Smith*, 15 Mon. B. 325; *Long v. White*, 5 Marsh. J. J. 226.

11 *Musson v. Trigg*, 51 Miss. 172, 185, 186. See *Davis v. Wilkerson*, 40 Miss. 585; *Witcher v. Wilson*, 47 Miss. 663; *Pollen v. James*, 45 Miss. 129; *Dunbar v. Meyer*, 43 Miss. 679; *Armstrong v. Stoval*, 26 Miss. 275; *Robertson v. Bruner*, 24 Miss. 242; *Boarman v. Graves*, 23 Miss. 283; *Doley v. Mitchell*, 9 Smedes & M. 435; *Montgomery v. Bank*, 10 Smedes & M. 567.

12 *Davis v. Smith*, 75 Mo. 219, 225; *Boatmen v. Collins*, 75 Mo. 280, 281; *Whiteley v. Stewart*, 63 Mo. 363; *Gage v. Gates*, 62 Mo. 417; *Sharpe v. McPike*, 62 Mo. 307; *Bank v. Taylor*, 62 Mo. 333; *Lincoln v. Rowe*, 57 Mo. 571; *Kimm v. Wieppert*, 46 Mo. 532; 2 *Am. Rep.* 541; *Miller v. Brown*, 47 Mo. 504, 505; 4 *Am. Rep.* 345; *Schapath v. Ambs*, 46 Mo. 114, 116; *Claffin v. Van Wagoner*, 32 Mo. 232; *Whitesides v. Cannon*, 23 Mo. 457; *Segond v. Garland* 23 Mo. 547; *Coates v. Robinson*, 10 Mo. 757, 760.

13 *Batchelder v. Sargent*, 47 N. H. 262, 266; *Nims v. Bigelow*, 45 N. H. 343; *Hutchins v. Colby*, 43 N. H. 159; *Vogt v. Tichnor*, 48 N. H. 242.

14 *Phillips v. Graves*, 20 Ohio St. 371, 390; 5 *Am. Rep.* 675; *Urmston v. Williams*, 35 Ohio St. 296; *Hardy v. Van Harlinger*, 7 Ohio St. 208.

15 *Orange v. Traver*, 7 Sawy. 210, 215, 216.

16 Bryan, 18 Tex. 461, 465, 467; Milburn v. Walker, 11 Tex. 329; Hollis v. Francois, 5 Tex. 203; 51 Am. Dec. 760.

17 Burnett v. Hawpe, 25 Gratt. 481, 486; Justes v. English, 30 Gratt. 565; Bank v. Chambers, 30 Gratt. 202, 209; Bain v. Buff, 76 Va. 371, 374; Finch v. Marks, 76 Va. 207, 210; Darnall v. Smith, 26 Gratt. 878; Muller v. Bailey, 21 Gratt. 528; Penn v. Whitehead, 17 Gratt. 503; Nixon v. Rose, 12 Gratt. 431; Woodson v. Perkins, 5 Gratt. 345; Whiting v. Rust, 1 Gratt. 483; West, 3 Rand. 373.

18 Radford v. Carwile, 13 W. Va. 573, 581-682, collecting cases; Dages v. Lee, 20 W. Va. 584; Hughes v. Hamilton, 19 W. Va. 366.

19 Todd v. Lee, 15 Wis. 365, 369; 16 Wis. 480, 483; Krouskop v. Shontz, 51 Wis. 204, 214.

20 Staley v. Hamilton, 19 Fla. 275, 297; Thrasher v. Geiger, 18 Fla. 809; Caulk v. Fox, 13 Fla. 148; Alston v. Rowles, 13 Fla. 117; Abernathy, 8 Fla. 243; Sanderson v. Jones, 6 Fla. 430; Maiben v. Bobe, 6 Fla. 381; Lewis v. Yale, 4 Fla. 418; Smith v. Paythress, 2 Fla. 92.

21 Williams v. Hugunin, 69 Ill. 214, 217; 18 Am. Rep. 607; Furness v. McGovern, 78 Ill. 337, 338; Carpenter v. Mitchell, 50 Ill. 470, 474; Schmidt v. Postel, 63 Ill. 53; Pomeroy v. Insurance, 40 Ill. 378.

22 Shannon v. Bartholemew, 53 Ind. 54, 56; Crickmore v. Breckenridge, 51 Ind. 294, 297; Hodson v. Davis, 43 Ind. 253; Hasheagan v. Specker, 36 Ind. 414; Katrowitz, 31 Ind. 105; Abdil, 26 Ind. 287; Cox v. Wood, 20 Ind. 54; Reese v. Cochran, 10 Ind. 195.

23 First v. Haire, 36 Iowa, 443, 446; Patton v. Kinsman, 17 Iowa, 423, 433; Greenough v. Wiggington, 2 Greene, 455.

24 Girault v. Adams, 61 Md. 1, 13; Wilson v. Jones, 46 Md. 349, 357, 358; Hall v. Eccleston, 37 Md. 510, 520; Jackson v. West, 22 Md. 71, 84; Koontz v. Nabb, 16 Md. 549, 554.

25 Willard v. Eastham, 15 Gray, 323, 335; Rogers v. Ward, 8 Allen, 387; Tracy v. Keith, 11 Allen, 214; Allen v. Fuller, 113 Mass. 402; Wilder v. Richie, 117 Mass. 382, 384.

26 Davies v. Conklin, 22 Mich. 255, 259. See Powers v. Russell, 26 Mich. 179; Rankin v. West, 25 Mich. 255; Denison v. Gibson, 24 Mich. 187.

27 Pond v. Carpenter, 12 Minn. 430, 432; Leonard v. Carpenter, 5 Minn. 156; Flynn v. Messenger, 23 Minn. 203; 41 Am. Rep. 273.

28 Perkins v. Elliott, 23 N. J. Eq. 526, 535; Armstrong v. Ross, 20 N. J. Eq. 109, 119; Johnson v. Cummings, 16 N. J. Eq. 97, 104; Oakley v. Pound, 14 N. J. Eq. 178; Pentz v. Simonson, 13 N. J. Eq. 232, 235; Leaycraft v. Hedden, 4 N. J. Eq. 552.

29 Yale v. Dederer, 68 N. Y. 229; 22 N. Y. 450; 18 N. Y. 265; 31 Barb. 525; 21 Barb. 286; 20 How. Pr. 242; 19 How. Pr. 146; 17 How. Pr. 165; Jaques v. Methodist, 17 Johns. Ch. 548; 3 Johns. Ch. 37; 1 Johns. Ch. 450; 8 Am. Dec. 447; Saratoga v. Pruyn, 90 N. Y. 250, 254; McVey v. Cantrell, 70 N. Y. 295, 297; 26 Am. Rep. 605; Conlin v. Cantrell, 64 N. Y. 217; Bank v. Miller, 63 N. Y. 639; Manhattan v. Thompson, 53 N. Y. 80, 84; Insurance v. Babcock, 42 N. Y. 613; Scott v. Otis, 25 Hun, 33; Speck v. Gurnee, 25 Hun, 644; Gardner, 7 Paige, 112, 116; Knowles v. McCanilly, 10 Paige, 343, 346; Cook v. Brook, 21 Barb. 546, 551. See New York cases cited and discussed; Radford v. Carwile, 13 W. Va. 573, 611.

30 Partridge v. Stocker, 36 Vt. 108, 117; Sargeant v. French, 54 Vt. 384, 391; Dale v. Robinson, 51 Vt. 20; 31 Am. Rep. 669; Priest v. Cone, 51 Vt. 499; 31 Am. Rep. 695.

31 *Montgomery v. Eveleigh*, 1 McCord (Ch. 267, 269; *Magwood v. Johnson*, 1 Hill Eq. 228, 230; *Cater v. Everleigh*, 4 Desaus. 19; *Frazier v. Brownslow*, 3 Ired. Eq. 237; 42 Am. Dec. 165.

32 *Knox v. Jordan*, 5 Jones Eq. 175, 176; *Harris*, 7 Ired. Eq. 311; 53 Am. Dec. 303; *Frazier v. Brownslow*, 3 Ired. Eq. 237; 42 Am. Dec. 165; *Newlin v. Freeman*, 4 Ired. Eq. 312; *Leigh v. Smith*, 3 Ired. Eq. 442; *Felton v. Reid*, 7 Jones, 269; *Rogers v. Hinton*, Phill. Eq. 101; *Pippen v. Wesson*, 74 N. C. 442; *Atkinson v. Richardson*, 74 N. C. 458; *Hardy v. Holly*, 64 N. C. 661.

33 *Lyne v. Crouse*, 1 Pa. St. 111; *Rogers v. Smith*, 4 Pa. St. 93; *Coryell v. Duntun*, 7 Pa. St. 530, 531; 49 Am. Dec. 489; *Chessman v. Wagoner*, 9 Pa. St. 473; *Mahon v. Gormley*, 24 Pa. St. 80; *Keeney v. Good*, 21 Pa. St. 349; *Hough v. Jones*, 32 Pa. St. 432; *Pa. v. Foster*, 35 Pa. St. 134; *Murray v. Keyes*, 35 Pa. St. 384; *Parke v. Kleeher*, 37 Pa. St. 251; *Steinman v. Ewing*, 43 Pa. St. 63; *Remfelt v. Clemens*, 46 Pa. St. 455; *Wright v. Brown*, 41 Pa. St. 244; *Weiman v. Anderson*, 42 Pa. St. 311; *Hinney v. Phillips*, 50 Pa. St. 382; *Hartman v. Ogborn*, 54 Pa. St. 120; *Walker v. Coover*, 65 Pa. St. 430; *McMullen v. Beatty*, 66 Pa. St. 359; *Wells v. McCall*, 74 Pa. St. 267; *Moore v. Cornell*, 78 Pa. St. 320; *Shnyder v. Noble*, 94 Pa. St. 286, 289; *Lancaster v. Dolan*, 1 Rawls, 231; 15 Am. Dec. 625; *Wallace v. Coston*, 9 Watts, 137; *Dorance v. Scott*, 3 Whart. 306; 21 Am. Dec. 509; *Johnson*, 1 Grant, 468.

34 *Metcalf v. Cook*, 2 R. I. 355, 363.

35 *Creighton v. Clifford*, 6 S. C. 188, 198; *Clark v. Makenna*, Cheves Eq. 163; *Reid v. Lamar*, 1 Stroh. Eq. 27; *Adams v. Mackey*, 6 Rich. Eq. 75; *James v. Mayrant*, 4 Desaus. 591; 6 Am. Dec. 620; cases *supra*, n. 31.

36 *Staley v. Hamilton*, 19 Fla. 275, 297; *supra*, n. 20; *ante*, 2 203.

37 *Musson v. Trigg*, 57 Miss. 172, 185, 186; *supra*, n. 11; *ante*, 2 203.

38 *Young*, 7 Cold. 461, 462. See *Kirby v. Miller*, 4 Cold. 4; *Cherry v. Clements*, 10 Humph. 552, 572; *Litton v. Baldwin*, 8 Humph. 209; 47 Am. Dec. 605; *Marshall v. Stephens*, 8 Humph. 159; 47 Am. Dec. 601; *Morgan v. Elam*, 4 Yerg. 375; *Ware v. Sharp*, 1 Swan, 489.

39 See *ante*, 2 203.

40 See also *Pippen v. Wesson*, 74 N. C. 442; *supra*, n. 32.

41 *Maclay v. Love*, 25 Cal. 367, 381; *supra*, n. 6.

## 2 208. Wife's power to will her equitable separate estate.

—A married woman has at common law no capacity to make a will,<sup>1</sup> except in the exercise of a power.<sup>2</sup> But her will of her equitable separate estate may be valid in equity.<sup>3</sup> As in the case of her conveyances,<sup>4</sup> there are two rules: (1) That she cannot will this estate unless empowered by the settlement;<sup>5</sup> (2) that she can will this estate unless restrained by the settlement.<sup>6</sup> The same principles govern in determining what constitutes a restraint;<sup>7</sup> and the same difference of opinion exists as to whether she can will only<sup>8</sup> her personalty,

rents, and profits,<sup>9</sup> etc., or the corpus of her realty as well.<sup>10</sup> A power to will she executes as a *femme sole*,<sup>11</sup> and when she can will independently of a power her husband need not consent.<sup>12</sup> And the fact that a statute enables her to will<sup>13</sup> does not restrict her capacity to will under a power,<sup>14</sup> or in equity as a *femme sole*, her equitable separate estate;<sup>15</sup> still a will will not be held an execution of a power if it does not refer to such power and is valid without it.<sup>16</sup>

1 Harris v. Harberson, 9 Bush, 397, 402, 404; *post*, §§ 340-354.

2 Schley v. McCeney, 36 Md. 267, 275; Heath v. Withington, 6 Cush. 497, 500; *post*, § 342.

3 Leigh v. Smith, 3 Ired. Eq. 445, 446. See Taylor v. Meads, 4 DeGex J. & S. 597, 607; Pride v. Bubb, Law R. 7 Ch. 64; Cooper v. Macdonald, Law R. 7 Ch. 288; Wells v. Bradford, 28 Ala. 200, 212; Schull v. Murray, 32 Md. 9, 15, 16; Mory v. Michael, 18 Md. 227, 241; Radford v. Carwile, 13 W. Va. 573, 579, 663, 667.

4 Swift v. Castle, 23 Ill. 200, 220; *ante*, §§ 203, 205.

5 Wilkinson v. Wright, 6 Mon. B. 576, 577; West, 3 Rand. 373, 377; *ante*, 203.

6 Schull v. Murray, 32 Md. 9, 10, 16; *ante*, §§ 203, 204.

7 Lyne v. Crouse, 1 Pa. St. 111, 115; *ante*, § 204.

8 Radford v. Carwile, 13 W. Va. 573, 579, 663. Consult *ante*, § 205.

9 Fettiplace v. Gorges, 1 Ves. Jr. 46, 48; 3 Bro. Ch. 8, 10; Rich v. Cockell, 9 Ves. 361; Parker v. Brooke, 9 Ves. 583; Brooke, 25 Beav. 346; Caton v. Ridout, 1 Macn. & G. 599; Rowe, 2 DeGex G. & S. 24; West, 3 Rand. 373, 377.

10 Taylor v. Meads, 4 DeGex J. & S. 597, 607; Bagget v. Meux, 1 Phill. Ch. 628; Hall v. Waterhouse, 11 Jur. N. S. 361; Schull v. Murray, 32 Md. 9, 12, 16; Radford v. Carwile, 13 W. Va. 573, 667.

11 Schley v. McCeney, 36 Md. 267, 275.

12 Wells v. Bradford, 28 Ala. 200, 212.

13 Taylor v. Meads, 4 DeGex J. & S. 597, 607; *post*, §§ 345, 346.

14 Taylor v. Meads, 4 DeGex J. & S. 597, 607; *post*, § 216.

15 Buchanan v. Turner, 26 Md. 1, 7; *post*, § 216.

16 Mory v. Michael, 18 Md. 227, 241; *ante*, § 205.

§ 209. Wife's rights in the increase—rents, profits, income, etc.—of her equitable separate property.—The sprout savors of the root and goes the same way,<sup>1</sup> and therefore the increase of a wife's equitable separate estate is also equitable separate estate,<sup>2</sup> and is subject to the same incidents as the original estate,<sup>3</sup> a rule which ap-

plies to all of a wife's separate property.<sup>4</sup> Thus, her savings are hers whether invested or not;<sup>5</sup> so is furniture bought with her separate money;<sup>6</sup> and so property bought with an inalienable fund is inalienable.<sup>7</sup> The rents and profits of her realty are hers absolutely,<sup>8</sup> even where her right to dispose of the corpus of the realty is denied.<sup>9</sup> Still, if she is living with her husband, and allows him to collect and use her income for his own purposes, a gift of it to him is presumed,<sup>10</sup> and it may even be taken by his creditors;<sup>11</sup> only when he appropriates it wrongfully,<sup>12</sup> or as her agent,<sup>13</sup> or trustee,<sup>14</sup> or on promise to repay her,<sup>15</sup> does she retain her rights.

1 Gore v. Knight, 2 Vern. 525; Prec. Ch. 255.

2 Hout v. Sorrell, 11 Ala. 386, 399, 404.

3 Rowley v. Unwin, 2 Kay & J. 138, 141.

4 Stout v. Perry, 70 Ind. 501, 504. Discussed *post*, § 227.

5 Hout v. Sorrell, 11 Ala. 386, 399.

6 Duncan v. Cashier, Law R. 10 C. P. 554, 557.

7 Rowley v. Unwin, 2 Kay & J. 138, 141.

8 Cheever v. Wilson, 9 Wall. 108, 119; Roper, 29 Ala. 247, 252.

9 McChesney v. Brown, 25 Gratt. 393, 404; Radford v. Carwile, 13 W. Va. 573, 670; *ante*, §§ 205, 203.

10 Andrews v. Huckabee, 30 Ala. 143, 152. S. P. Square v. Dean, 4 Bro. Ch. 326; Dixon, Law R. 9 Ch. D. 587; Roper, 29 Ala. 247, 253; Humphries v. Handson, 30 Ark. 79; McGill, 19 Fla. 341, 355; Kuhn v. Stansfield, 28 Md. 210, 216; Cogley, 13 Phila. 308; *ante*, §§ 42, 86.

11 Nelson v. Hollins, 9 Baxt. 553, 554.

12 Gover v. Owings, 16 Md. 91, 99; *ante*, § 42.

13 Buckley v. Wells, 33 N. Y. 518, 521; *ante*, §§ 86, 87.

14 Gover v. Owings, 16 Md. 91, 99; *ante*, §§ 42, 86-88, 202.

15 Kuhn v. Stansfield, 28 Md. 210, 216; *ante*, § 42.

§ 210. Remedies of wife concerning her equitable separate estate. — A married woman may bring suit in equity respecting her equitable separate property,<sup>1</sup> even it seems alone;<sup>2</sup> but usually her trustee or husband should join.<sup>3</sup> She may have an injunction to prevent her husband's interference with her rights,<sup>4</sup> or to prevent his creditors from seizing her property for his

debts.<sup>5</sup> She may have her conveyance if fraudulently obtained set aside.<sup>6</sup> She and her second husband may at law recover her property from her first husband's estate.<sup>7</sup> She has all legal remedies through her husband or trustee.<sup>8</sup>

1 2 Perry Trusts, § 654; Jackson v. Haworth, 1 Sausse & S. 161.

2 Crump, 34 Beav. 570.

3 See Brent v. Magruder, 6 Md. 58; *post*, §§ 439, 440.

4 Anderson, 2 Mylne & K. 427.

5 Shirley, 9 Paige, 363, 364. Compare Frazier v. White, 49 Md. 1.

6 Fargo v. Goodspeed, 87 Ill. 290, 296.

7 Thomas v. Harkness, 13 Bush, 23, 30.

8 See SUITS OF MARRIED WOMEN, *post*, §§ 428-463.

§ 211. Remedies against equitable separate property of married women. — A wife, of course, takes her property subject to all its liabilities,<sup>1</sup> so that when the settlement is by will the property settled may be subjected in equity to the testator's debts.<sup>2</sup> But it is not liable to any greater extent than her ordinary property,<sup>3</sup> except on her contracts which bind it in equity.<sup>4</sup> Thus, it is not peculiarly liable for her antenuptial obligations,<sup>5</sup> or for her torts committed during coverture.<sup>6</sup> On her contracts which bind it she is not personally liable,<sup>7</sup> and it is liable only in equity<sup>8</sup> in a proceeding *in rem*.<sup>9</sup> The bill of complaint must show that the property sought to be charged is his separate property,<sup>10</sup> as she cannot at common law render her general property liable;<sup>11</sup> and her husband,<sup>12</sup> or her trustee<sup>13</sup> must be made a party. The contract sued on may be enforced as an equitable mortgage,<sup>14</sup> or a specific lien if a particular piece of property has been charged in writing;<sup>15</sup> but ordinarily there is no specific lien,<sup>16</sup> and not only can property in the hands of *bona fide* purchasers not be touched,<sup>17</sup> but all separate property owned at the time of the hearing,<sup>18</sup> or even such as is acquired after the decree,<sup>19</sup> may be held



responsible; it need not have been owned at the time of the contract.<sup>20</sup> Income which cannot be anticipated,<sup>21</sup> or the corpus of realty which cannot be disposed of,<sup>22</sup> cannot be subjected to the payment of the wife's debts; but generally principal and income are liable,<sup>23</sup> and the court may enforce the debt by ordering the wife to pay on penalty of sale,<sup>24</sup> or by decreeing a sale,<sup>25</sup> or by appointing a receiver;<sup>26</sup> the corpus of the realty will usually be resorted to only in case of necessity;<sup>27</sup> the personalty, then the rents and profits, and then the realty will be exhausted.<sup>28</sup> This is the meaning of the rule that a married woman may be sued with respect to her equitable separate property;<sup>29</sup> she is in fact not sued as one *sui juris*;<sup>30</sup> the proceeding being *in rem* she may by permission of the court be summoned outside of its jurisdiction;<sup>31</sup> she may answer separately,<sup>32</sup> and she is bound by her answer,<sup>33</sup> or by her settlement of accounts;<sup>34</sup> her declarations are evidence against her;<sup>34</sup> and she may be guilty of contempt of court.<sup>26</sup>

1 Winston v. McAlpine, 65 Ala. 377; Cowton v. Wickersham, 54 Pa. St. 302.

2 Cowton v. Wickersham, 54 Pa. St. 302.

3 See Chubb v. Stretch, Law R. 9 Eq. 555, 560; Crocker v. Clements, 23 Ala. 296, 304.

4 Vanderheyden v. Mallory, 1 Comst. 452, 462, 463; *ante*, §§ 206, 207.

5 Haygood v. Harris, 10 Ala. 271, 292; Vanderheyden v. Mallory, 1 Comst. 452, 462, 463. Compare Crocker v. Clements, 23 Ala. 296, 304.

6 See 2 Perry on Trusts, § 659.

7 Vaughan v. Vanderstegen, 2 Drew. 165, 184; Miller v. Newton, 23 Cal. 554, 564; Davis v. Smith, 75 Mo. 219, 225.

8 Haygood v. Harris, 10 Ala. 291, 292; Miller v. Newton, 23 Cal. 554, 561; Hall v. Eccleston, 37 Md. 510, 521, 522; Gage v. Gates, 62 Mo. 412, 417; Radford v. Carwile, 13 W. Va. 573, 662.

9 Vaughan v. Vanderstegen, 2 Drew. 165, 184; Challar v. Temple, 39 Ark. 238, 242; Smith v. Gooch, 86 N. C. 276, 280; *post*, § 453.

10 Palmer v. Rankins, 30 Ark. 771, 773; *post*, 431.

11 Vaughan v. Vanderstegen, 2 Drew. 165, 184; Buchner v. Davis, 29 Ark. 444, 447.

12 See Grout v. Van Schoonoven, 9 Paige, 255; Sherman v. Burnham, 6 Barb. 403; Wilson, 6 Fred. Eq. 236; Bralley v. Emerson, 7 Vt. 369.



- 13 *Vaughan v. Vanderstegen*, 2 Drew. 165, 184; *Palmer v. Rankins*, 30 Ark. 771, 774; *ante*, § 202.
- 14 See *Tiernan v. Poor*, 1 Gill & J. 216, 229; 19 Am. Dec. 225; *ante*, §§ 205, 207.
- 15 *Maxon v. Scott*, 55 N. Y. 247, 251.
- 16 *Davis v. Smith*, 75 Mo. 219, 224; *Todd v. Ames*, 60 Barb. 454, 463; *Maxon v. Scott*, 55 N. Y. 247, 251; *Rourke v. Murphy*, 12 Abb. N. C. 402; *Todd v. Lee*, 16 Wis. 484, 485.
- 17 *Rourke v. Murphy*, 12 Abb. N. C. 402.
- 18 *Todd v. Ames*, 60 Barb. 454, 463.
- 19 See *Taggart v. Muse*, 60 Miss. 870, 872.
- 20 *Todd v. Lee*, 16 Wis. 484, 485.
- 21 *Pike v. Fitzgibbon*, 29 Week. R. 551, 552; *ante*, §§ 204, 206.
- 22 *Aylett v. Ashton*, 1 Mylne & C. 105, 111; *Radford v. Carwile*, 13 W. Va. 573, 674, 680; *ante*, §§ 205, 206, 208.
- 23 *Challar v. Temple*, 39 Ark. 238, 247; *Whitesides v. Cannon*, 23 Mo. 457, 474; *Phillips v. Graves*, 20 Ohio St. 371, 390; 5 Am. Rep. 675.
- 24 *Girault v. Adams*, 61 Md. 1, 13.
- 25 *Whitesides v. Cannon*, 23 Mo. 457, 474; *supra*, n. 24.
- 26 *Phillips v. Graves*, 20 Ohio St. 371, 390; 5 Am. Rep. 675.
- 27 *Wilburn v. Walker*, 11 Tex. 329, 344.
- 28 *Phillips v. Graves*, 20 Ohio St. 371, 390; 5 Am. Rep. 675.
- 29 2 *Perry Trusts*, § 654; *Jackson v. Haworth*, 1 Sausse & S. 161; *Thompson v. Beuseley*, Eq. R. 59.
- 30 *Vaughan v. Vanderstegen*, 2 Drew. 165, 184.
- 31 *Copperthwaite v. Tuite*, 13 Ir. Eq. 63.
- 32 *Kerchner v. Kempton*, 47 Md. 568, 589, 590; *post*, § 461.
- 33 *Clerk v. Miller*, 2 Atk. 379; *Callow v. Howle*, 1 DeGex & S. 531; *Beeching v. Morphey*, 8 Hare, 120; *Clive v. Carew*, 1 Johns. & H. 207; *Kerchner v. Kempton*, 47 Md. 568, 589.
- 34 *Wilton v. Hill*, 25 Law J. Ch. 156.
- 35 *Peacock v. Monk*, 2 Ves. 193; *Vansittart*, 4 Kay & J. 70; *Harris v. Mott*, 14 Beav. 169.
- 36 *Graham v. Fitch*, 2 DeGex & S. 246; *Taylor*, 12 Beav. 271; *Home v. Patrick*, 30 Beav. 405; *Ottway v. Wing*, 12 Sim. 90.

§ 212. **Rights of husband or his creditors over wife's equitable separate estate.**—It is an inseparable incident of equitable separate property that the husband has no marital control or dominion over it,<sup>1</sup> though he may have certain bare legal rights as trustee.<sup>2</sup> He cannot release an executor for her separate legacy,<sup>3</sup> and if a bank pays her separate money to him, it must pay over again to her,<sup>4</sup> unless he has acted as her agent in fact.<sup>5</sup> He cannot sue her lessees in trespass for enter-

ing upon the land leased.<sup>6</sup> Nor can his creditors make this property of hers liable in any way for his debts.<sup>7</sup>

1 Pollard v. Merrill, 15 Ala. 169, 173; *ante*, §§ 197, 198.

2 Fears v. Brooks, 12 Ga. 195, 197; Jackson v. McAliley, Spear Eq. 303, 305; 40 Am. Dec. 620; *ante*, § 202.

3 Windsor v. Bell, 61 Ga. 671, 674; *ante*, § 85.

4 University v. Bell, 65 Ga. 528, 530; *ante*, § 85.

5 See AGENCY OF HUSBAND FOR WIFE, *ante*, §§ 84-88.

6 Allen v. Walker, Law R. 5 Ex. 187, 190.

7 Izod v. Lamb, 1 Crompt. & J. 35, 43; Archer v. Rorke, 7 Ir. Eq. 478, 481; Nelson v. Hollins, 9 Baxt. 553, 554.

§ 213. **How the wife may lose or extinguish her equitable separate estate.**—If the wife joins with her trustee in a breach of trust she cannot afterwards hold him responsible therefor.<sup>1</sup> So she may lose her separate estate by not keeping it separate,<sup>2</sup> or by allowing her husband to collect and appropriate it,<sup>3</sup> or by permitting the price of it to be paid in his hands without any understanding that he shall repay it;<sup>4</sup> but her consent that her husband shall have the income does not take away her remedy against him for the conversion of the principal.<sup>5</sup> She does not lose her rights by standing silently by while the husband sells it; being under his coercion she is not estopped.<sup>6</sup> A legacy from her husband to her does not affect her rights against his estate for converting her property.<sup>7</sup> She cannot lose it by consent if she is a lunatic.<sup>8</sup> And if her husband obtains her conveyance by fraud, equity will set it aside.<sup>9</sup> On his death,<sup>10</sup> or on divorce,<sup>11</sup> the separate estate ceases.

1 Hughes v. Wells, 9 Hare, 749, 773. See Montford v. Cadogan, 19 Ves. 635, 640.

2 Buck v. Ashbrook, 59 Mo. 200, 203; Shirley, 9 Paige, 363, 365.

3 Andrews, 30 Ala. 144, 157; *ante*, § 209.

4 Chester v. Greer, 5 Humph. 26, 34; *ante*, § 209.

5 Dixon, Law R. 9 Ch. D. 587, 593.

6 Carpenter, 27 N. J. Eq. 502, 504; *post*, § 417.

7 Taylor, 4 Jur. N. S. 1218, 1220.

8 Rawley v. Unwin, 2 Kay & J. 139, 142.

9 *Fargo v. Goodspeed*, 87 Ill. 290, 296 ; *post*, § 405.

10 *Pooley v. Webb*, 3 Cold. 599, 602, 603 ; *post*, § 214.

11 *O'Kill v. Campbell*, 4 N. J. Eq. 13, 15 ; *post*, § 215.

§ 214. **Effect of death on the wife's equitable separate property.**—Death destroys the marriage status and removes the reason for the existence of separate property of married women.<sup>1</sup>

1. *Death of husband.* On the death of the husband the wife's disabilities cease,<sup>2</sup> and the existence of the equitable separate estate is suspended<sup>3</sup> or destroyed;<sup>4</sup> the trust determines and she takes the legal title,<sup>5</sup> unless there are trustees named with active duties;<sup>6</sup> restraints on her powers of alienation are of no force while she is *discovert*,<sup>7</sup> and she may deal with the property as if never married;<sup>8</sup> if she marries again without having disposed of the property, the equitable separate estate and the restraints revive;<sup>9</sup> nor can she after her husband's death have a trust providing against any husband set aside,<sup>10</sup> because she may marry again.<sup>11</sup> If she has power given her to convey with her husband's consent, after his death she may convey alone.<sup>12</sup>

2. *Death of wife.* On the wife's death her equitable separate estate ceases,<sup>13</sup> the title of her trustees is at an end,<sup>14</sup> and her husband has the same rights as he has in her general property;<sup>15</sup> her personalty he takes as administrator, next of kin, or survivor;<sup>16</sup> in her realty he has *curtesy*.<sup>17</sup> But the settlement may expressly continue the estate beyond the wife's life,<sup>18</sup> and thus exclude the husband's rights as widower.<sup>19</sup> A trust for her "forever" does not exclude such rights;<sup>20</sup> but one for her and her heirs forever does,<sup>21</sup> or to her and after her death to her legal heirs,<sup>22</sup> the husband not being an "heir,"<sup>23</sup> or to her and her heirs and representatives as if she had never been married.<sup>24</sup> Of

course he has no rights in property she has disposed of within the scope of her powers,<sup>25</sup> and his rights are subject to the debts imposed by her on the property.<sup>26</sup>

1 Discussed in Stewart M. & D. §§ 452-475.

2 Wilson v. McCarty, 55 Md. 277, 283; Stewart M. & D. § 452.

3 Proley v. Webb, 3 Cold. 599, 603; Beaufort v. Collier, 6 Humph. 487, 492; 44 Am. Dec. 321.

4 Hemersly v. Smith, 4 Whart. 126, 129; Smith v. Starr, 3 Whart. 62, 66.

5 Thomas v. Harkness, 13 Bush, 23, 29.

6 O'Kill v. Campbell, 4 N. J. Eq. 13, 15.

7 Proley v. Webb, 3 Cold. 599, 603; Radford v. Carwile, 13 W. Va. 573, 672; *ante*, § 204.

8 Radford v. Carwile, 13 W. Va. 573, 672.

9 Tullett v. Armstrong, 1 Beav. 1; 4 Mylne & C. 377, 395; Proley v. Webb, 3 Cold. 599, 603; Radford v. Carwile, 13 W. Va. 573, 672. *Contra*, Hemersly v. Smith, 4 Whart. 126, 129. See *ante*, § 204.

10 O'Kill v. Campbell, 4 N. J. Eq. 13, 15.

11 O'Kill v. Campbell, 4 N. J. Eq. 13, 15; *ante*, § 201.

12 Proley v. Webb, 3 Cold. 599, 602.

13 Cooney v. Woodburn, 33 Md. 320, 327; Stewart M. & D. § 466.

14 Bercy v. Lavretta, 63 Ala. 374, 380; Wilkinson v. Wright, 6 Mon. B. 576, 577; *ante*, § 202.

15 Cases collected in Stewart M. & D. § 466.

16 Ward v. Thompson, 3 Gill & J. 349, 357; Good v. Harris, 2 Ired. Eq. 630, 632. See Malony v. Kennedy, 10 Sim. 254; Proudley v. Fielder, 2 Mylne & K. 57; Stewart M. & D. §§ 464, 465.

17 Ward v. Thompson, 6 Gill & J. 349, 357; Richardson v. Stodder, 100 Mass. 528, 530; *ante*, § 157.

18 Johnstone v. Lumb, 15 Sim. 308; Cooney v. Woodburn, 33 Md. 320, 327; Spann v. Jennings, 1 Hill Ch. 324, 325; Stewart M. & D. § 466.

19 Brown, 6 Humph. 127, 130; *supra*, n. 18.

20 Brown, 6 Humph. 127, 130.

21 Ward v. Thompson, 6 Gill & J. 349, 357; Waters v. Tagewell, 9 Md. 291, 304; Gardenhire v. Hinds, 1 Head, 402, 405, 406.

22 Waters v. Tagewell, 9 Md. 291, 304.

23 Waters v. Tagewell, 9 Md. 291, 305; Stewart M. & D. § 457.

24 Brown v. Johnson, 13 Ala. 232, 233; Hutchins, 11 Md. 29, 37, 39.

25 Cooney v. Woodburn, 33 Md. 320, 327; *ante*, §§ 203-208.

26 McKay v. Allen, 6 Yerg. 41, 49.

§ 215. Effect of divorce on wife's equitable separate estate.—A divorce *a mensa et thoro* does not, generally speaking, destroy the disabilities of coverture, or make the wife a *femme sole*,<sup>1</sup> and the reason for equitable

separate property not being removed the estate continues;<sup>2</sup> but an absolute divorce has the same effect as the husband's death.<sup>3</sup> The effect is the same whether the husband or the wife be the guilty party.<sup>4</sup> No divorce affects the rights of a wife under a marriage settlement,<sup>5</sup> unless a provision in such settlement so provides.<sup>6</sup>

1 Barber, 21 How. 532, 601; Stewart M. & D. § 431.

2 Smoot v. Lecatt, 1 Stewt. 590, 602; Clark, 6 Watts & S. 85, 88; Stewart M. & D. §§ 443, 444.

3 O'Kill v. Campbell, 4 N. J. Eq. 13, 15; Stewart M. & D. § 430, n. 16.

4 See Harvard v. Head, 111 Mass. 200, 212; Stewart M. & D. § 430.

5 Harris v. McElroy, 45 Pa. St. 216, 220; Stewart M. & D. § 440.

6 See Charlesworth, Law R. 9 Ex. 33, 40; Stewart M. & D. §§ 191, 440.

§ 216. Effect of modern statutes on equitable separate estates of married women.—Of course no statute can disturb the rights of a woman depending on a settlement executed before its passage.<sup>1</sup> And statutes creating statutory separate estates do not prevent the creation and existence of equitable separate estates,<sup>2</sup> or curtail the jurisdiction of equity thereover;<sup>3</sup> even in Alabama, where the statutory separate estate is an equitable one,<sup>4</sup> the equitable separate estate exists side by side with it.<sup>5</sup> Such statutes have been passed to enlarge and not to diminish the wife's rights,<sup>6</sup> and though she may have a legal estate where she had an equitable one before,<sup>7</sup> and unless restrained by the settlement<sup>8</sup> may deal with her equitable separate estate under a statute *as a married woman*,<sup>9</sup> yet the fact that she may by such statute convey,<sup>10</sup> will,<sup>11</sup> contract,<sup>12</sup> or sue<sup>13</sup> does not prevent her conveying,<sup>14</sup> willing,<sup>15</sup> charging her property,<sup>16</sup> or suing,<sup>17</sup> *as an unmarried woman* in equity as before;<sup>18</sup> she may elect to exercise her powers under the statute or under the settlement.<sup>19</sup> Her right to deal with her equitable separate property, as far as the common law

or statutes allowed, has always been admitted,<sup>20</sup> even in those States which denied her any powers not contained in the settlement<sup>21</sup>—as in North Carolina<sup>22</sup> and South Carolina<sup>23</sup>—excepting Pennsylvania.<sup>24</sup> And so generally modern statutes *enlarge* but do not *diminish* the powers of wives over their equitable separate estate.<sup>25</sup> Still the statute in California requiring her contracts to be in writing,<sup>26</sup> and that in New York requiring her husband's consent to her contracts,<sup>27</sup> were held applicable to her charges of her equitable separate estate.<sup>28</sup> How far she has equitable rights over her statutory separate estate is of course a different question.<sup>29</sup>

1 Willis v. Cadenhead, 28 Ala. 472, 474; Musson v. Trigg, 51 Miss. 172, 182; *ante*, §§ 19-23.

2 Short v. Battle, 52 Ala. 456, 467; Huckabee v. Andrews, 34 Ala. 646, 647; Cannon v. Turner, 32 Ala. 483, 486; Smith, 30 Ala. 642, 644; Pickens v. Oliver, 29 Ala. 528, 531; Blevins v. Buck, 26 Ala. 292, 298; Snyder v. Webb, 3 Cal. 83; Miller v. Newton, 23 Cal. 554, 566; Pomeroy v. Manhattan, 40 Ill. 398, 402; Armstrong v. Kerns, 12 Md. Law Rec. 29, 29; 62 Md. 000; Richardson v. Stodder, 100 Mass. 528, 530; Devries v. Conklin, 22 Mich. 255, 260; Musson v. Trigg, 57 Miss. 172, 182, 183; Phippen v. Wesson, 74 N. C. 437, 442; Phillips v. Graves, 20 Ohio St. 371, 390, 391; 5 Am. Rep. 675; Insurance v. Foster, 35 Pa. St. 134, 136. But see Maclay v. Love, 25 Cal. 367; Davis v. Foy, 7 Smedes & M. 64, 67; Colvin v. Currier, 22 Barb. 371, 382; Wood, 83 N. Y. 575, 579; Yale v. Dederer, 22 N. Y. 451, 460.

3 Phillips v. Graves, 20 Ohio St. 371, 390, 391; 5 Am. Rep. 675. See Abraham v. Tappe, 60 Md. 317, 323; Herzberg v. Sachse, 60 Md. 426; Mitchell v. Otey, 26 Miss. 236, 239.

4 Short v. Battle, 52 Ala. 456, 467; *ante*, § 150.

5 Huckabee v. Andrews, 34 Ala. 464, 467; *supra*, n. 2.

6 Phillips v. Graves, 20 Ohio St. 371, 390, 391; 5 Am. Rep. 675; Witsell v. Charleston, 7 S. C. 88, 101, 102.

7 Snyder v. People, 26 Mich. 255, 259, 260; 12 Am. Rep. 302; Colvin v. Currier, 22 Barb. 371, 382; Yale v. Dederer, 22 N. Y. 451, 460; Wood, 83 N. Y. 575, 579.

8 Young, 7 Cold. 461, 480; *ante*, § 204.

9 Dillon v. Grace, 2 Schoales & L. 456, 462-464; Wright v. Cadogan, 2 Eden, 239, 257-259; Phillips v. Graves, 20 Ohio St. 371, 390, 391; 5 Am. Rep. 675; Clayton v. Rose, 84 N. C. 106, 109; Witte v. Clarke, 17 S. C. 313, 327; Young, 7 Cold. 461, 480; Lightfoot v. Boss, 8 Lea, 350, 351; Hawley v. Troyman, 29 Gratt. 728, 730.

10 See DEEDS OF MARRIED WOMEN, *post*, §§ 394-408.

11 See WILLS OF MARRIED WOMEN, *post*, §§ 340-354.

12 See CONTRACTS OF MARRIED WOMEN, *post*, §§ 355-393.

13 See SUITS OF MARRIED WOMEN, *post*, §§ 428-463.

14 *Miller v. Newton*, 23 Cal. 554, 566; *Pomeroy v. Manhattan*, 40 Ill. 338, 402; *Armstrong v. Kerns*, 12 Md. Law Rec. 28, 29; 62 Md. 000; *Phillips v. Graves*, 20 Ohio St. 371, 380, 391; 5 Am. Rep. 675; *ante*, § 205. In States where she has only such powers as are given (*ante*, § 203) she can convey only under statute or under power: *Clayton v. Rose*, 87 N. C. 106, 109.

15 *Buchanan v. Turner*, 26 Md. 1, 5-7; *ante*, § 208.

16 *Phillips v. Graves*, 20 Ohio St. 371, 390, 391; 5 Am. Rep. 675; *ante*, §§ 206, 207.

17 *Abraham v. Tappe*, 60 Md. 317, 323; *Herzberg v. Sachse*, 60 Md. 426; *Mitchell v. Otey*, 23 Miss. 236, 239; *Phillips v. Graves*, 20 Ohio St. 371, 380; 5 Am. Rep. 675; *ante*, § 210.

18 Discussed *ante*, §§ 203-210.

19 *Blevins v. Buck*, 26 Ala. 292, 298.

20 *Dillon v. Grace*, 2 Schoales & L. 456, 462; *Young*, 7 Cold. 461, 482; *supra*, n. 9.

21 States enumerated: *Ante*, §§ 203, 205; *Gray v. Robb*, 4 Heisk. 74, 77, is overruled by *Lightfoot v. Boss*, 8 Lee, 350, 351.

22 *Clayton v. Rose*, 87 N. C. 106, 109.

23 *Witte v. Clarke*, 17 S. C. 313, 327; *Witsell v. Charleston*, 7 S. C. 83, 161, 102.

24 *Twinling*, 97 Pa. St. 36, 41; *Brown v. Wright*, 44 Pa. St. 224, 241; *Insurance v. Foster*, 35 Pa. St. 134, 136.

25 Inference from above cited cases.

26 *Maclay v. Love*, 25 Cal. 367, 381.

27 *Yale v. Dederer*, 22 N. Y. 451, 460.

28 *Ante*, §§ 206, 207.

29 *Pippen v. Wesson*, 74 N. C. 437, 442, 443; *post*, §§ 217, *et seq.*

## CHAPTER XIII.

### WIFE'S STATUTORY SEPARATE ESTATE.

ART. I. IN GENERAL, §§ 217-219.

II. SOURCES OF, §§ 220-231.

III. INCIDENTS OF, §§ 232-243.

### ART. I.—WIFE'S STATUTORY SEPARATE ESTATE IN GENERAL.

§ 217. Statutory separate estate defined.

§ 218. The statutes described.

§ 219. "Property," "personal rights," etc., defined.

§ 217. **Statutory separate estate defined.**—In all the States statutes have been passed destroying more or less the husband's common-law rights in his wife's property or in portions thereof, and securing such property to a greater or less extent to her own use and enjoyment.<sup>1</sup> Property held by a married woman under such a statute is called her *statutory separate estate*, and must be distinguished from her *equitable separate estate* which is the creature of equity,<sup>2</sup> and may exist side by side with it.<sup>3</sup>

1 Dow v. Gould, 31 Cal. 631, 637-646; *ante*, § 9.

2 See EQUITABLE SEPARATE ESTATE, *ante*, §§ 197-216.

3 Musson v. Trigg, 51 Miss. 172, 182, 183; *ante*, § 216.

§ 218. **The statutes creating separate estates described.**—Each State has its own married women's separate property act,<sup>1</sup> and the different acts differ indefinitely. Some merely secure the wife's property from her husband's creditors,<sup>2</sup> others make her the legal owner of it,<sup>3</sup> others give her full capacity to deal with it as if unmarried.<sup>4</sup> The determination of the effect and meaning of these acts involves great difficulties.<sup>5</sup> In many States the constitution creates a separate estate



for married women;<sup>6</sup> and where the constitution says "a wife's property shall be protected from the debts of her husband," it is protected whether the legislature passes a proper act or not;<sup>7</sup> and an act of the legislature must not conflict with the constitutional provision,<sup>8</sup> but is not in conflict if it simply gives more protection.<sup>9</sup>

1 45 and 46 Viet. c. 75 (Married Women's Property Act, 1882); Ala. Code, 1876, §§ 2705, *et seq.*; Ark. Dig. 1874, §§ 4193, 4194; Cal. Civ. Code, 1881, §§ 157, *et seq.*; Colo. G. L. 1877, § 1747; Conn. G. L. 1875, p. 186; Del. R. C. 1874, p. 479; Fla. Dig. 1881, pp. 754-756; Ga. R. C. 1878, § 1754; Ill. R. S. 1880, p. 502; Ind. R. S. 1881, §§ 5117, 5118, 5130; Iowa R. C. 1880, § 2202; Kan. C. L. 1881, §§ 3136, 3137; Ky. R. S. 1881, p. 531; Me. R. S. 1871, pp. 491, 492; Md. R. C. 1878, pp. 481, 482; Mass. P. S. 1882, 818; Mich. R. S. 1882, § 6295; Minn. St. 1878, p. 769; Miss. R. S. 1880, § 1167; Mo. R. S. 1879, §§ 3232, 3295, 3296; Neb. C. S. 1881, p. 343; Nev. C. L. 1873, §§ 152, 153; N. H. G. L. 1878, p. 434; N. J. Rev. 1877, p. 636; N. Y. R. S. 1882, pp. 2336, 2338; Ohio R. S. 1880, §§ 3108, 3109, 3111; Pa. Purd. Dig. 1872-1876, p. 1005; R. I. P. S. 1882, pp. 422-424; S. C. G. S. 1871, p. 441; Tenn. R. S. 1873, § 2481; Tex. R. S. 1879, § 2851; Vt. R. L. 1880, §§ 2321, *et seq.*; W. Va. R. S. 1879, pp. 773-777; Wis. R. S. 1878, §§ 2340-2342.

2 Schindel, 12 Md. 294, 313. See *Robertson v. Wilcox*, 36 Conn. 426, 430; *Johnson v. Chapman*, 35 Conn. 550; *Wheeler v. Jennings*, 16 Mon. B. 476; *Logan v. McGill*, 8 Md. 461, 470; *Chapman v. Williams*, 13 Gray, 416; *White v. Dorris*, 35 Me. 181, 187, 188; *Coleman v. Satterfield*, 2 Head, 259.

3 See *Vreeland*, 16 N. J. Eq. 512, 524.

4 See *Mich. R. S. 1882*, § 6295.

5 See statutes discussed *ante*, §§ 12-23.

6 See Ala. Const. art. 10, § 6; Ark. Const. art. 12, § 6.

7 See *Kemp v. Clark*, Md. Law Rec. April 19, 1884; Md. Ct. App. Oct. Term, 1884.

8 *Pelzer v. Campbell*, 15 S. C. 581, 589, 594.

9 *Pelzer v. Campbell*, 15 S. C. 581, 591, 592.

§ 219. "Property," "personal rights," etc., defined.—The meaning of the word "property," in such clauses as "a married woman's property shall be held by her as a *femme sole*," has been much discussed.<sup>1</sup> It is said not to include mere contingent interests,<sup>2</sup> but it does include corporeal and incorporeal,<sup>3</sup> animate and inanimate,<sup>4</sup> property; it includes choses in action *ex contractu*,<sup>5</sup> and, probably, choses in action *ex delicto*;<sup>6</sup> it includes money,<sup>7</sup> though when one act forbids contracts for the payment of money and another author-

izes contracts in reference to separate property, a married woman's note is void;<sup>8</sup> so a mining interest in a "lead" is property.<sup>9</sup> Sometimes a statute gives a married woman as her separate property any right of action growing out of the violation of her "personal rights."<sup>10</sup> Assault and battery is such a violation,<sup>11</sup> so is enticing away her husband,<sup>12</sup> though the latter is not an injury to her person or character.<sup>13</sup> When her "household furniture" is hers by statute, this term includes a sewing machine<sup>14</sup> and a piano.<sup>15</sup> though this seems to depend on the intent of the legislature and nature of the statute;<sup>16</sup> so that under attachment laws the term has been held not to cover pianos,<sup>17</sup> paintings,<sup>18</sup> or trunks.<sup>19</sup>

1 See cases cited in Lawson's Concordance.

2 *Dering v. Kynaston*, Law R. 6 Eq. 210, 214.

3 *Smilie v. Siler*, 35 Ala. 88, 95; *Selden v. Bank*, 69 Pa. St. 424, 425.

4 *Gans v. Williams*, 62 Ala. 41, 43.

5 *Nicholson v. Drury*, Law R. 7 Ch. D. 48, 53, 54; *Barton*, 32 Md. 212, 224, 225; *Kemp v. Clark*, Md. Law Rec. Apr. 19, 1884; S. C. on appeal, Md. Law Rec. Feb. 28, 1885; *Cooper v. Alger*, 51 N. H. 172, 175; *Vreeland*, 16 N. J. Eq. 512, 522; *Selden v. Bank*, 69 Pa. St. 424, 425; *Bennett v. Reid*, 4 Heisk. 440, 444; *Williams v. Lord*, 75 Va. 390, 398; *Gibson*, 43 Wis. 23, 35; 28 Am. Rep. 527; *post*, § 229.

6 See *pro. Berger v. Jacobs*, 21 Mich. 215, 220, 221; *Leonard v. Pope*, 27 Mich. 145, 146; *Mann v. Marsh*, 21 How. Pr. 372, 376; *Clark v. Harlan*, 1 Cin. Rep. 418, 423; *Westlake*, 34 Ohio St. 621, 633; 32 Am. Rep. 397; *Stevenson v. Morris*, 37 Ohio St. 10, 17; cases *supra*, n. 5. *Contra*, *Ballard v. Russell*, 33 Me. 196, 197; 54 Am. Dec. 620; *Laughlin v. Eaton*, 54 Me. 156, 160; *Gibson*, 43 Wis. 23, 33; 28 Am. Rep. 527; *post*, § 230.

7 *Mitchell*, 35 Miss. 108, 114.

8 *Butler v. Baber*, 54 Cal. 178, 179.

9 *Cheuvete v. Mason*, 4 G. Greene, 231, 238, 239.

10 See Ohio R. S. 1880, §§ 3108, 3109, 3111.

11 *Stevenson v. Morris*, 37 Ohio St. 10, 17.

12 *Clark v. Harlan*, 1 Cin. Rep. 418, 423.

13 *Logan*, 77 Ind. 558, 564, 565.

14 *Von Storch v. Winslow*, 13 R. I. 23, 24; 43 Am. Rep. 10.

15 *Von Storch v. Winslow*, 13 R. I. 23, 24; 43 Am. Rep. 10.

16 30 Alb. L. J. 25; *Richardson v. Hall*, 124 Mass. 237.

17 *Dunlap v. Edgerton*, 30 Vt. 224, 229; *Tanner v. Billings*, 18 Wis. 163, 166.

18 *Lea*, 30 Alb. L. J. 25; Pa. Com. Pleas, June 28, 1884.

19 *Towns v. Pratt*, 33 N. H. 345.

## ART. II.—SOURCES OF STATUTORY SEPARATE PROPERTY.

- § 220. Modes of acquisition, generally.
- § 221. Owned at time of marriage.
- § 222. Acquired in any manner.
- § 223. Acquired by purchase.
- § 224. Acquired by gift or grant.
- § 225. Acquired by devise, bequest, descent, distribution.
- § 226. Acquired by exchange.
- § 227. Acquired by increase.
- § 228. Acquired by services or trade.
- § 229. Acquired by contract.
- § 230. Acquired by tort.
- § 231. Acquired jointly with husband.

§ 220. Modes of acquisition of statutory separate property, generally.—Some statutes provide that a married woman shall hold “her property” to her sole and separate use,<sup>1</sup> but most of them define more or less specifically what property she shall so hold,<sup>2</sup> as property owned at the time of her marriage, or afterwards acquired by gift, grant, devise, bequest, descent, in course of distribution, in course of trade, by her services, in any manner, etc.<sup>3</sup> The naming of one mode excludes property acquired in other modes.<sup>4</sup> Property is “acquired” if it is paid into possession after the passage of the statute, though owned as a chose in action before;<sup>5</sup> and the word “held” means simply “owned,” and applies to equitable estates and choses in action.<sup>6</sup>

1 See Ark. Dig. 1874, § 4193.

2 See Md. R. C. 1878, p. 481, §§ 19, 20.

3 See statutes cited *ante*, § 218; *post*, §§ 222-231.

4 See CONSTRUCTION OF STATUTES, *ante*, § 16.

5 *White v. Waite*, 47 Vt. 502, 507. Consult *ante*, §§ 19-23.

6 *Witsell v. Charleston*, 7 S. C. 88, 99, 100.

§ 221. Property owned at the time of marriage.—There is a general agreement among the statutes in making property of a married woman owned at the time of her

marriage her separate property<sup>1</sup> A right in an undistributed estate existing at the time of marriage is property owned or "held"<sup>2</sup> at the time of marriage,<sup>3</sup> though when it comes into her possession it is also property acquired during coverture.<sup>4</sup>

1 See *ante*, § 218; *Vandevoort v. Gould*, 35 N. Y. 639; *Prevot v. Lawrence*, 51 N. Y. 219.

2 *Witsell v. Charleston*, 7 S. C. 88, 99, 100.

3 *Sharp v. Burns*, 35 Ala. 653, 662.

4 *White v. Waite*, 47 Vt. 502, 507.

§ 222. Property acquired "in any manner."—It has been held that a statute giving a wife her property acquired "in any manner" covers a right of action for personal injuries to herself,<sup>1</sup> and personalty obtained from a sale of realty;<sup>2</sup> but generally these words add nothing to the word "property."<sup>3</sup>

1 *Berger v. Jacobs*, 21 Mich. 215, 220, 221; *post*, § 230.

2 *Brevard v. Jones*, 50 Ala. 221, 233.

3 PROPERTY defined, *ante*, § 219.

§ 223. Property acquired by purchase.—At common law a sale or grant (these words being equivalent to "purchase"<sup>1</sup>) to a married woman, could be avoided by her husband,<sup>2</sup> and was not good as against her unless ratified by her after the dissolution of coverture;<sup>3</sup> speaking generally, therefore, a married woman could not purchase at common law.<sup>4</sup> A statute securing to a married woman property acquired by her by purchase, gives her the power to purchase,<sup>5</sup> and as an incident of this, to purchase on credit<sup>6</sup>—though this seems to have been denied in some cases.<sup>7</sup> But such a statute does not enable her to make an executory contract for the purchase of property;<sup>8</sup> nor does it enable her to make a personal contract for the purchase money;<sup>9</sup> though, whether on the ground that the contract for the purchase money is a contract with refer-

ence to her separate property<sup>10</sup> or is intended to be a charge upon it,<sup>11</sup> or on other grounds,<sup>12</sup> property purchased by her is always liable, at least in equity, for the purchase money.<sup>13</sup> So it is bound in her hands by any conditions<sup>14</sup> or encumbrances<sup>15</sup> attached to it. So, under special statutes her promissory note for the purchase money,<sup>16</sup> and her mortgage securing it have been held good<sup>17</sup> at law.<sup>18</sup> When she may trade she may purchase goods for her trade;<sup>19</sup> when she may earn she may purchase a machine to sew upon or a piano to give lessons upon.<sup>20</sup> The purchase of an implement for her separate farm,<sup>21</sup> or of a horse for farming purposes,<sup>22</sup> (but not for pleasure riding<sup>23</sup>), or of furniture for her house<sup>24</sup> (but not of supplies for the family<sup>25</sup>), is a contract relating to her separate property.<sup>26</sup> A co-purchaser is bound, whether she is bound or not.<sup>27</sup> She may equally well make her purchase through an agent.<sup>28</sup> But as against her husband's creditors she must show that the purchase was made out of her own funds or upon her own credit;<sup>29</sup> this is what is meant when it is said that she cannot purchase on credit.<sup>30</sup> She may purchase her husband's lands at public sale.<sup>31</sup> An exchange is really a purchase.<sup>32</sup>

1 *Abbey v. Deyo*, 44 Barb. 374, 379; *Dayton v. Walsh*, 47 Wis. 113, 119; 32 Am. Rep. 757; *post*, § 224.

2 *Bedford v. Burton*, 196 U. S. 333, 339; *Patterson v. Robinson*, 25 Pa. St. 81, 82.

3 *Hunter v. Duvall*, 4 Bush, 433, 439; *post*, § 366.

4 *Hydrick v. Burke*, 30 Ark. 124; *Alvarson v. Jones*, 10 Cal. 9.

5 *Tiemeyer v. Turnquist*, 85 N. Y. 516, 521; 39 Am. Rep. 674; *Krouskop v. Shontz*, 51 Wis. 204, 216; *Dayton v. Walsh*, 47 Wis. 113, 114, 118; 32 Am. Rep. 757. See *Warner v. Dove*, 33 Md. 579; *Allen v. Fulier*, 118 Mass. 402, 403; *Hylar v. Atwood*, 26 N. J. Eq. 504, 507.

6 *Shields v. Keys*, 24 Iowa, 298, 313; *Devries v. Conklin*, 22 Mich. 255, 259; *Abbey v. Deyo*, 44 Barb. 374, 379; *Knapp v. Smith*, 27 N. Y. 277, 279; *Frecking v. Rolland*, 53 N. Y. 425; *Tiemeyer v. Turnquist*, 85 N. Y. 516, 521, 522; 39 Am. Rep. 674; *Cramer v. Hansford*, 53 Wis. 85, 87. Consult *Carpenter v. Mitchell*, 50 Ill. 470, 473; 54 Ill. 126; *Johnson v. Chissom*, 14 Ind. 415; *Spaulding v. Day*, 10 Allen. 96, 100; *Ratcliffe v. Collins*, 35 Miss. 581; *Porterfield v. Butler*, 47 Miss. 165, 176; 12 Am. Rep. 329; *Johnson v. Houston*, 47 Mo. 227; *Coffin v. Merrill*, 22

N. H. 352; *Baringer v. Stiver*, 49 Pa. St. 129, 132; *Robinson v. Wallace*, 39 Pa. St. 129, 132; *Buck v. Gibson*, 37 Vt. 653.

7 *Dunning v. Pike*, 46 Me. 461, 463. See *Miller v. Handy*, 33 La. An. 160, 167.

8 *Jones v. Crosthwaite*, 17 Iowa, 393, 402.

9 *Doyle v. Orr*, 51 Miss. 229, 232.

10 *Labaree v. Colby*, 99 Mass. 559, 560; *Williamson v. Dodge*, 5 Hun, 498, 499; *Krouskop v. Shontz*, 51 Wis. 204, 214.

11 *Bedford v. Bntler*, 106 U. S. 333, 339, 340; *Doyle v. Orr*, 51 Miss. 229, 232.

12 *Patterson v. Robinson*, 25 Pa. St. 81, 83; *infra*, notes, 13, 16, 17, 18.

13 *Pemberton v. Johnson*, 46 Mo. 342, 343. See *Shields v. Keys*, 24 Iowa, 298, 313; *post*, §§ 238, 407.

14 *Bedford v. Burton*, 106 U. S. 81, 83; *Patterson v. Robinson*, 25 Pa. St. 81, 83.

15 *Brewer v. Maurer*, 38 Ohio St. 543, 553; 43 Am. Rep. 436. See *Brown v. Hermann*, 14 Abb. Pr. 394; *supra*, n. 15.

16 *Allen v. Fuller*, 118 Mass. 402, 403.

17 *Hyler v. Atwood*, 26 N. J. Eq. 504, 507.

18 *Krouskop v. Shontz*, 51 Wis. 204, 214, 216. As to liability of wife and her property for purchase money, see *Bedford v. Burton*, 106 U. S. 333, 339; *Chilton v. Bralden*, 2 Black, 458; *Smith v. Doe*, 56 Ala. 456; *Trieber v. Stover*, 30 Ark. 727, 729; *Donovan*, 41 Conn. 551, 554; *Boland v. Klink*, 63 Ga. 447; *Carpenter v. Mitchell*, 54 Ill. 126; *Kyger v. Skirt*, 34 Ind. 249, 250; *Hunter v. Duvall*, 4 Bush, 438; *Fowler v. Jacob*, Md. Ct. App. Oct. Term, 1883; *Allen v. Fuller*, 118 Mass. 402, 403; *Spaulding v. Day*, 10 Allen, 98; *Bosford v. Pearson*, 7 Allen, 504, 506; *Stewart v. Jenkins*, 6 Allen, 300; *Tillman v. Shackleton*, 15 Mich. 447, 456; *Doyle v. Orr*, 51 Miss. 229, 232; *Nicholson v. Heiderhoff*, 50 Miss. 56; *Eskridge*, 51 Miss. 522; *Pemberton v. Johnson*, 46 Mo. 342, 343; *Bruner v. Wheaton*, 46 Mo. 363; *Messer v. Smith*, 58 N. H. 298, 299; *Albin v. Lord*, 39 N. H. 196; *Armstrong v. Ross*, 20 N. J. Eq. 109; *Tiemeyer v. Turnquist*, 85 N. Y. 516, 521; 39 Am. Rep. 674; *Brewer v. Maurer*, 38 Ohio St. 543, 553; 43 Am. Rep. 436; *Sixbee v. Bowen*, 91 Pa. St. 149; *Willingham v. Leake*, 7 Baxt. 453; *Bugbee v. Blood*, 48 Vt. 500; *Cramer v. Hansford*, 53 Wis. 85, 87.

19 *Trieber v. Stover*, 30 Ark. 727, 730; *Krouskop v. Shontz*, 51 Wis. 204, 217; *post*, § 475.

20 *Dayton v. Walsh*, 47 Wis. 113, 120; 32 Am. Rep. 757. See *Williamson v. Dodge*, 5 Hun, 498, 499.

21 *McCormick v. Holbrook*, 22 Iowa, 487, 489.

22 *Mitchell v. Smith*, 32 Iowa, 484, 487.

23 *McDermott v. Garland*, 1 Mackey, 496.

24 *Harman v. Garland*, 1 Mackey, 1.

25 *Schneider v. Garland*, 1 Mackey, 350.

26 These contracts discussed *ante*, §§ 206, 207; *post*, § 373.

27 *Robinson*, 11 Bush, 174, 179; *post*, §§ 368, 382, 408.

28 *Southard v. Plummer*, 36 Me. 84, 85; *Abbey v. Deyo*, 44 Barb. 374, 379; *ante*, §§ 84-88; *post*, § 364.

29 *McMasters v. Edgar*, 22 W. Va. 671, 676. See *Curry v. Bott*, 53 Pa. St. 400, 403; *Bower*, 63 Pa. St. 126, 128; *ante*, §§ 119-121.

30 *Hopkins v. Carey*, 23 Miss. 54, 58 ; *supra*, n. 7.

31 *Blum v. Harrison*, 50 Ala. 16 ; *Baker*, 22 Minn. 265 ; *Bowser*, 82 Pa. St. 57.

32 *Elder v. Cordray*, 54 Ill. 244, 245 ; *post*, § 226.

§ 224. Property acquired by "gift" or "grant." — The words "gift and grant" include all modes of acquiring property by deed ;<sup>1</sup> "gift" includes a grant of realty ;<sup>2</sup> "grant" applies equally to personalty ;<sup>3</sup> "grant" includes a deed of bargain and sale.<sup>4</sup> A gift of personalty may be by parol.<sup>5</sup> A lease is property obtained by grant.<sup>6</sup> Whether a deed creates an equitable separate or a statutory separate estate depends upon its wording ;<sup>7</sup> unless the intent to exclude the husband's rights clearly appears, a statutory separate estate is created.<sup>8</sup> Deeds from the husband to the wife are often unlawful,<sup>9</sup> but generally if creditors are not prejudiced<sup>10</sup> they are good in equity,<sup>11</sup> and may be good at law.<sup>12</sup> At common law a husband might refuse a gift, or grant to his wife,<sup>13</sup> and if he accepted one he had his marital rights therein ;<sup>14</sup> this did not apply to settlements for her equitable separate use ;<sup>15</sup> under the statutes she takes the legal title as fully as she took the equitable before under such settlements.<sup>16</sup> The instrument need not contain words showing the property was meant to be "separate" ;<sup>17</sup> where the contrary has been held, this was due to the peculiar wording of some early statutes.<sup>18</sup>

1 *Huyler v. Atwood*, 26 N. J. Eq. 504, 505 ; *Lyon v. Green*, 42 Wis. 532, 536.

2 *Libby v. Chase*, 117 Mass. 105, 106.

3 *Spaulding v. Day*, 10 Allen, 96, 98 ; *Abbey v. Deyo*, 44 Barb. 374, 379.

4 *Lyon v. Green*, 42 Wis. 532, 535.

5 *Tinsley v. Roll*, 2 Met. (Ky.) 509, 510. See *Walton v. Broadus*, 6 Bush, 328, 329 ; *Ewing v. Helm*, 2 Tenn. Ch. 368, 369.

6 *Darby v. Callaghan*, 16 N. Y. 71, 75. See *Vandevoort v. Gould*, 36 N. Y. 639 ; *Dayton v. Walsh*, 47 Wis. 113, 120 ; 32 Am. Rep. 757.

7 *Prout v. Roby*, 15 Wall. 471, 474 ; *ante*, § 200.

8 *Lippincott v. Mitchell*, 94 U. 761, 768, 770. See *Williams*, 68 Ala. 405, 406; *Swain v. Duane*, 48 Cal. 358, 360; *ante*, § 216.

9 See *Jenkins v. Flinn*, 37 Ind. 340; *Towle*, 114 Mass. 167; *ante*, §§ 40-46, 125.

10 Discussed *ante*, §§ 113-118.

11 *Barron*, 24 Vt. 375, 398, 399; *ante*, § 42.

12 *Burdeno v. Amperse*, 14 Mich. 91, 97; *ante*, § 43.

13 *Patterson v. Robinson*, 25 Pa. St. 81, 82; *ante*, § 223.

14 *Kleake v. Koeltze*, 75 Mo. 239, 243; *ante*, §§ 148, 157, 170, 176.

15 *Pollard v. Merrill*, 15 Ala. 169, 173; *ante*, §§ 197-216.

16 *Clawson*, 25 Ind. 229, 231; *post*, §§ 232, *et seq.*

17 *Sims v. Rickets*, 35 Ind. 181, 192, 193; 9 Am. Rep. 679; *Stone v. Gazzam*, 46 Ala. 265, 273.

18 See *Hoyt v. Parks*, 39 Conn. 357, 360, 361; *Merrill v. Bullock*, 105 Mass. 486, 493; *Leighton v. Sheldon*, 16 Minn. 243.

§ 225. Property acquired by devise, bequest, descent, distribution.—A lapsed legacy which goes as directed by statute is not property acquired by devise, bequest, descent, or distribution.<sup>1</sup> A wife's share before distribution is property,<sup>2</sup> and if owned at the time of her marriage is protected as property owned at that time, though she receive it afterwards.<sup>3</sup> Property "acquired" by distribution covers a share paid after the passage of the statute though owned before.<sup>4</sup>

1 *Williams v. Bailee*, Md. Law Rec. Jan. 14, 1882.

2 *Smilie v. Siler*, 35 Ala. 88, 95.

3 *Sharp v. Burns*, 35 Ala. 653, 662.

4 *White v. Waite*, 47 Vt. 502, 507.

§ 226. Property acquired by exchange.—An exchange is really a purchase.<sup>1</sup> Purchases with her separate savings,<sup>2</sup> personalty exchanged for other separate property,<sup>3</sup> money received for her dower,<sup>4</sup> are separate property; but it must be remembered that when one kind of property is changed with her consent into another—as when realty is changed into personalty—she has only such rights as naturally attach to the latter kind.<sup>5</sup> Still, when realty owned before the passage of the separate property act was changed into personalty after



the passage thereof, said personalty was held to come within the statute;<sup>6</sup> and sometimes a statute expressly makes the proceeds of realty separate property.<sup>7</sup>

1 *Elder v. Condray*, 54 Ill. 244, 245; *Fisk v. Wright*, 47 Mo. 352; *ante*, § 223.

2 *Merritt v. Lyon*, 3 Barb. 110, 114.

3 *Pike v. Baker*, 53 Ill. 163, 167; *Ireland v. Webber*, 27 Ind. 256, 259; *Welch*, 63 Mo. 57, 60; *Hutchins v. Colby*, 43 N. H. 159, 160.

4 *Beal v. Storm*, 26 N. J. Eq. 372, 376.

5 Discussed *ante*, § 136.

6 *Brevard v. Jones*, 50 Ala. 221, 233.

7 *Sloan v. Torrey*, 78 Mo. 623, 626.

§ 227. **Property acquired by accretion (increase).**—The sprout savors of the root and goes the same way,<sup>1</sup> and the increase of separate property is separate, whether the statute says so or not;<sup>2</sup> the products, rents, increase, and interest are all separate property.<sup>3</sup> Thus, the crop of a married woman's lands is hers<sup>4</sup> (it is "profits"<sup>5</sup>), though raised by her husband as her agent,<sup>6</sup> and though the land was bought by her on credit and has not been paid for,<sup>7</sup> and it continues separate property though invested in horses, mules, etc.<sup>8</sup> So the foal of a separate mare,<sup>9</sup> calves of a separate cow,<sup>10</sup> and the earnings of separate property<sup>11</sup> are separate property. The rule applies equally to realty and personalty.<sup>12</sup> though while the ownership of the increase of personal property is a natural incident of the ownership of personal property,<sup>13</sup> this is said not to be the case with real estate<sup>14</sup> (the accumulated rents of realty being merely personal property<sup>15</sup>), and on this ground the naming of the increase of realty in the Minnesota statute was held not to exclude the increase of personalty,<sup>16</sup> a contrary decision having been rendered under the statute of Texas.<sup>17</sup> A statute may expressly regulate the increase of statutory separate property,<sup>18</sup> as in Alabama, where the husband has full power thereover.<sup>19</sup> Nor is

a husband, unless guilty of fraud or breach of trust, or by virtue of a promise,<sup>20</sup> accountable to his wife for her rents and profits.<sup>21</sup>

1 Gore v. Knight, 2 Vern. 535; Prec. Ch. 255; *ante*, § 209.

2 See Barrack v. McCullough, 3 Kay & J. 110, 119; Hart v. Sorrell, 11 Ala. 386, 404; Gans v. Williams, 62 Ala. 41, 43; Sanford v. Atwood, 44 Conn. 141, 143; Bongard v. Core, 82 Ill. 19, 21; Langford v. Greirson, 5 Bradf. 361, 365; Stout v. Perry, 70 Ind. 501, 504; Russell v. Long, 52 Iowa. 250, 252; Hanson v. Millett, 55 Me. 184, 189; Hill v. Chambers, 30 Mich. 422, 429; Williams v. McGrade, 13 Minn. 46, 52; Hutchins v. Colby, 43 N. H. 159, 161; Merritt v. Lyon, 3 Barb. 114; Knapp v. Smith, 27 N. Y. 280; Holcomb v. Meadville, 92 Pa. St. 338, 343; Nelson v. Hollins, 9 Baxt. 553, 554; De Blane v. Lynch, 23 Tex. 25, 27; Braden v. Gose, 57 Tex. 37, 40; Dayton v. Walsh, 47 Wis. 113, 118; 32 Am. Rep. 757. But see Bank v. Barnes, 2 Smedes & M. 165; Beatty v. Smith, 2 Smedes & M. 567.

3 Bongard v. Core, 82 Ill. 19, 21.

4 Stout v. Perry, 76 Ind. 501, 504; De Blane v. Lynch, 23 Tex. 25, 27.

5 Stout v. Perry, 70 Ind. 501, 504.

6 Langford v. Greirson, 5 Bradf. 361, 365; Russell v. Long, 52 Iowa, 250, 252; *ante*, § 87.

7 Dayton v. Walsh, 47 Wis. 113, 118; 32 Am. Rep. 757.

8 Nelson v. Hollins, 9 Baxt. 553, 554; *ante*, § 226.

9 Sanford v. Atwood, 44 Conn. 141, 143; Hanson v. Millett, 55 Me. 184, 189.

10 Russell v. Long, 52 Iowa, 250, 252; Hutchings v. Colby, 43 N. H. 159, 160.

11 Barrack v. McCullough, 3 Kay & J. 110, 119.

12 Holcomb v. Meadville, 92 Pa. St. 338, 343.

13 There being no estate in personalty originally: *Ante*, § 136.

14 Williams v. McGrade, 13 Minn. 46, 53.

15 Moreland v. Myall, 14 Bush, 474, 478.

16 Williams v. McGrade, 13 Minn. 46, 52, 53.

17 Braden v. Gose, 57 Tex. 37, 40.

18 Bruce v. Thompson, 25 Vt. 741, 747.

19 Mulhouse v. Weeden, 57 Ala. 502, 504; Sterrett v. Coleman, 57 Ala. 172, 173.

20 *Ante*, §§ 42, 45, 129, 209.

21 Chambers v. Richardson, 57 Ala. 85, 89; *ante*, §§ 42, 209.

§ 228. Property acquired by trade or earned. — (A married woman's right to the proceeds of her personal services has already been treated,<sup>1</sup> and "married women as traders" will be diseussed hereafter.<sup>2</sup>)

1 *Ante*, § 65.

2 *Post*, §§ 464, *et seq.*

§ 229. Property acquired by contract—Choses in action *ex contractu*.—Property acquired by an executed contract is acquired by purchase.<sup>1</sup> An executory contract is a chose in action *ex contractu*:<sup>2</sup> if made by the married woman herself, her right to enforce it depends on her capacity to make the contract,<sup>3</sup> her remedies, on the particular statutes of the forum,<sup>4</sup> and there seems to be no more reason to question her ownership of the proceeds than there would have been if the contract had been voluntarily executed.<sup>5</sup> If a contract made by a third person and acquired by her from such person by purchase, gift, etc., it is property so acquired, for all choses in action *ex contractu* are property.<sup>6</sup>

1 See *ante*, §§ 223, 224.

2 For definitions of CHOSSES IN ACTION, consult *ante*, § 171.

3 See CONTRACTS OF MARRIED WOMEN, *post*, §§ 355-393.

4 *Stoneman v. Erie*, 52 N. Y. 429, 432; *ante*, § 35; *post*, §§ 427-463.

5 See *Fuller v. Naugatuck*, 21 Conn. 557, 573, 574. It is property gotten by "purchase," *ante*, § 123, or "exchange," *ante*, § 226.

6 *Gibson*, 43 Wis. 23, 27, 32; 28 Am. Rep. 527; cases cited *ante*, § 219.

§ 230. Property acquired by tort.—Whether a right of action growing out of a personal tort to a married woman is "her property," is disputed.<sup>1</sup> On the one hand it is said that it is not,<sup>2</sup> but on the other, it is held to come within the description of "property acquired in any manner,"<sup>3</sup> and there is no doubt but that statutes may be so framed as to include it.<sup>4</sup> Thus, when a statute gives a married woman as separate property any right of action growing out of a violation of her "personal rights," a right of action for assault and battery,<sup>5</sup> or for enticing away her husband,<sup>6</sup> is included. But when a statute provides only for injuries to her person or character, she cannot sue for enticing away her husband.<sup>7</sup> While there hardly seems to be much reason for refusing to call choses in action *ex delicto* "property," if choses in action *ex contractu* are so

called,<sup>8</sup> whether the joint right of action of husband and wife in her right is "her" property, is a nice question: in Maryland at *nisi prius* it has been decided in the affirmative.<sup>9</sup> Different principles govern rights arising from torts to her property. Damages must be regarded as the natural increase of the injured property or as given in exchange for the property destroyed by the injury,<sup>10</sup> and would therefore seem to be property acquired by increase<sup>11</sup> or exchange.<sup>12</sup> The difficulty in this class of cases is, how shall the wife sue?<sup>13</sup> Damages awarded when her property is taken for public use belong to her.<sup>14</sup>

1 Consult *Chicago v. Dunn*, 52 Ill. 260, 263; *Logan*, 77 Ind. 558, 564; *Ballard v. Russell*, 33 Me. 196, 197; 54 Am. Dec. 620; *Laughlin v. Eaton*, 54 Me. 156, 160; *Kemp v. Clark*, Md. Law Rec. Apr. 19, 1884; *Berger v. Jacobs*, 21 Mich. 215, 220; *Leonard v. Pope*, 27 Mich. 145, 146; *Mann v. Marsh*, 21 How. Pr. 372, 376; *Clark v. Harlan*, 1 Cin. Rep. 418, 423; *Westlake*, 34 Ohio St. 621, 633; 32 Am. Rep. 397; *Stevenson v. Morris*, 37 Ohio St. 10, 17; *Gibson*, 43 Wis. 23, 27, 32; 28 Am. Rep. 527; cases cited *ante*, § 219, notes 5, 6.

2 *Ballard v. Russell*, 33 Me. 193, 197; 54 Am. Dec. 620; *Laughlin v. Eaton*, 54 Me. 156, 160; *Gibson*, 43 Wis. 23, 33; 23 Am. Rep. 527.

3 *Chicago v. Dunn*, 52 Ill. 260, 263; *Kemp v. Clark*, Md. Law Rec. Apr. 19, 1884; *Berger v. Jacobs*, 21 Mich. 215, 220; *Leonard v. Pope*, 27 Mich. 145, 146.

4 *Berger v. Jacobs*, 21 Mich. 215, 220; *Mann v. Marsh*, 21 How. Pr. 372, 376.

5 *Stevenson v. Morris*, 37 Ohio St. 10, 17; *ante*, § 76.

6 *Clark v. Harlan*, 1 Cin. Rep. 418, 423; *ante*, § 78.

7 *Logan*, 77 Ind. 558, 564, 565; *ante*, § 78.

8 But see *Gibson*, 43 Wis. 23, 27-33; 28 Am. Rep. 527.

9 *Kemp v. Clark*, Md. Law Rec. Apr. 19, 1884 (Appealed to Md. Ct. of Appeals, Oct. Term. 1884, affirmed Jan. 1885.)

10 1 *Sedgwick Damages*, pp. 35, 36.

11 Discussed *ante*, § 227.

12 Discussed *ante*, § 226.

13 *SUITS OF MARRIED WOMEN*, *post*, §§ 428, *et seq.*

14 *Sharpless v. Westchester*, 1 Grant, 257, 260.

§ 231. Property acquired jointly with her husband.— (The rights of a married woman in property acquired by her jointly with her husband will be discussed hereafter under "estates of both husband and wife.")<sup>1</sup>

1 *Post*, ch. xvi. §§ 302-311. See *ante*, §§ 128, 129, 132.

### ARTICLE III.—INCIDENTS OF STATUTORY SEPARATE PROPERTY.

- § 232. Necessity of inventory — Proof of title.
- § 233. Wife's power and control over, generally.
- § 234. Powers incidental to ownership, etc.
- § 235. Jurisdiction of equity — Trustee, etc.
- § 236. Wife's disposition of.
- § 237. Wife's contracts concerning.
- § 238. Wife's contracts as equitable charges upon.
- § 239. Wife's contracts under statutory authority.
- § 240. Wife's wills of.
- § 241. Wife's remedies concerning.
- § 242. Liabilities of.
- § 243. Rights of husband and his creditors in.

§ 232. Necessity of inventory — Proof of wife's title. — In some States statutes provide that a married woman shall file for record an inventory of her property, as a condition to its being protected as separate estate.<sup>1</sup> The usual construction of these statutes is, that they are intended to protect husbands' creditors,<sup>2</sup> and that as against her husband himself a wife holds her property as separate estate whether she has filed the inventory or not;<sup>3</sup> but in Arkansas the husband's common-law rights attach in absence of the inventory.<sup>4</sup> These statutes are said to be wise though harsh.<sup>5</sup> The wife's property is, under these statutes, liable for debts of the husband contracted after its acquisition but before the filing of the inventory;<sup>6</sup> so is property taken in exchange for it;<sup>7</sup> and it is liable for debts contracted before it was acquired, if no inventory has been filed.<sup>8</sup> The burden of proof is on the wife, when she is living with her husband, to show her title and the sources thereof, to any property she claims as separate estate.<sup>9</sup>

1 See Rev. Stat. of Ark. 1874, § 4201; Cal. 1881, § 165; Fla. 1881, pp. 754, 755; Mass. 1882, p. 819, § 11; Miss. 1880, § 1178; Nev. 1873, § 153.

2 *Selover v. Commercial*, 7 Cal. 266, 271; *Patterson v. Spearman*, 37 Iowa, 43; *Jones*, 19 Iowa, 236, 240.

- 3 Jones, 19 Iowa, 236, 240.
- 4 *Humfries v. Harrison*, 30 Ark. 79, 88.
- 5 *Price v. Sanchez*, 8 Fla. 136, 140.
- 6 *Miller v. Steele*, 39 Iowa, 531.
- 7 *Pressnall v. Herbert*, 34 Iowa, 543.
- 8 *Stewart v. Bishop*, 33 Iowa, 585.
- 9 *Walker v. Rearmy*, 36 Pa. St. 410, 416, 417; *ante*, § 119.

§ 233. **Wife's power and control over her statutory separate property generally.** — Under separate property acts, generally, the wife is legal owner of her property;<sup>1</sup> the right to possess it is in her;<sup>2</sup> for injuries to this right she may sue in her own name;<sup>3</sup> and she may so recover the property from the possession of a third party,<sup>4</sup> or even her husband.<sup>5</sup> Though she cannot prevent such use of it by her husband as is incidental to his right to live with her,<sup>6</sup> — for these statutes do not affect the marriage status,<sup>7</sup> — he has no property in it,<sup>8</sup> and no right of action against any one who removes it with her consent.<sup>9</sup> As to her powers over it, there are, as in the case of equitable separate property,<sup>10</sup> two rules: one, that she has no powers not given her by the act;<sup>11</sup> the other, that she has all powers not denied her by the act;<sup>12</sup> and there is the same difference of opinion as to whether the enumeration of certain powers is a negation of all others.<sup>13</sup> But it seems to be generally admitted that she may by implication do all things necessary to such ownership and enjoyment of her property as is called for by the act:<sup>14</sup> the difficulty seems to be to determine what things are so necessary.<sup>15</sup> Thus, while the power to "dispose" is said to be very different from the power to "use and enjoy,"<sup>16</sup> and is not included within that power,<sup>17</sup> the power to lease is, as she could not enjoy realty not occupied by her unless she had the power to lease it.<sup>18</sup> And while, when her property "shall be owned, used, and enjoyed by her as if unmarried," she cannot sell it,<sup>19</sup> yet when this

property is merchandise, she can sell it, as she could not otherwise enjoy it.<sup>20</sup> Her incidental powers,<sup>21</sup> and her power, respectively, to convey,<sup>22</sup> to will,<sup>23</sup> and to contract concerning,<sup>24</sup> her statutory separate property, are separately discussed. It is well settled that these statutes give a married woman no personal capacity,<sup>25</sup> but leave her, except as to her property, under the disabilities of coverture.<sup>26</sup>

1 *Harding v. Cobb*, 47 Miss. 599, 603; *Armstrong v. Ross*, 23 N. J. Eq. 103, 118; *Wilbur v. Fradenburgh*, 52 Barb. 474.

2 *Scott*, 13 Ind. 225, 227.

3 *Duress v. Horneffer*, 15 Wis. 195; *infra*, n. 4.

4 *Darby v. Callaghan*, 16 N. Y. 71, 76. See *Scott*, 13 Ind. 225, 227; *Jones*, 19 Iowa, 236; *Faddis v. Woollores*, 10 Kan. 56; *Miller v. Banister*, 109 Mass. 239; *post*, SUITS OF MARRIED WOMEN, §§ 423-463.

5 *Minler*, 4 Lans. 421. But see *ante*, §§ 52, 56.

6 *Cole v. Van Riper*, 44 Ill. 53, 63; *ante*, § 53.

7 *Walker v. Reamy*, 36 Pa. St. 410, 414; *ante*, § 13.

8 *Dunnahoo v. Holland*, 51 Ga. 147, 149; *post*, § 241.

9 *Southard v. Piper*, 36 Me. 84, 85; *post*, § 241.

10 *Radford v. Carwile*, 13 W. Va. 573; *ante*, § 203.

11 *Pelzer v. Campbell*, 15 S. C. 531, 539. See *Whitworth v. Carter*, 43 Miss. 61, 72; *Dunbar v. Meyer*, 43 Miss. 679, 685; *Kavanaugh v. Brown*, 1 Tex. 481, 484.

12 *Scott*, 13 Ind. 225, 227; *Hall v. Dotson*, 55 Tex. 520, 524.

13 *Pro. Williamson*, 18 Mon. B. 329, 385. *Contra*, *Kimm v. Weipert*, 46 Mo. 532, 536; 2 Am. Rep. 541. See *ante*, § 204.

14 *Meyers v. Rahte*, 46 Wis. 655, 658. See *Smith v. Howe*, 31 Ind. 233, 234; *Batchelder v. Sargent*, 47 N. H. 262, 263; *Mahon v. Gormley*, 24 Pa. St. 80; *post*, §§ 237, 373.

15 See *Naylor v. Field*, 29 N. J. L. 237, 238; *post*, § 234.

16 *Cole v. Van Riper*, 44 Ill. 53.

17 *Bressler v. Kent*, 61 Ill. 426, 430; 14 Am. Rep. 67; *post*, § 234.

18 *Parent v. Calleraud*, 64 Ill. 97, 99; *Vandevoort v. Gould*, 36 N. Y. 639, 643.

19 *Moore v. Cornell*, 68 Pa. St. 320, 322, 323; *post*, § 236.

20 *Wieman v. Anderson*, 42 Pa. St. 311, 317, 318.

21 *Beard v. Redolph*, 29 Wis. 136, 141; *post*, § 234.

22 *Armstrong v. Ross*, 20 N. J. Eq. 103, 120; *post*, § 236.

23 *Naylor v. Field*, 29 N. J. L. 237, 238; *post*, § 233.

24 *Johnson v. Cummings*, 16 N. J. Eq. 97, 104; *post*, §§ 237, 372, 373.

25 *Albin v. Lord*, 39 N. H. 196, 201, 202; *ante*, § 15; *post*, §§ 320, 371.

26 *McKee v. Reynolds*, 26 Iowa, 573, 582; *Pond v. Carpenter*, 12 Minn. 430, 432; *Ames v. Foster*, 42 N. H. 381, 385.

§ 234. *Wife's powers incidental to ownership, etc.*—When a married woman may “own, enjoy,” etc., her property, she has all powers incidental to ownership, enjoyment, etc.<sup>1</sup> Under a statute providing that “a married woman shall have and hold her separate property as if unmarried,” she may deal with it,<sup>2</sup> dispose of it,<sup>3</sup> exchange it,<sup>4</sup> and do with it whatever any owner may do with his or hers;<sup>5</sup> she may employ counsel to litigate her rights to it;<sup>6</sup> she may contract for servants and labor upon it,<sup>7</sup> for repairing it,<sup>8</sup> cultivating it,<sup>9</sup> selling its crops;<sup>10</sup> she may lease it;<sup>11</sup> and she may charge it with her debts as an incident to ownership.<sup>12</sup> One class of decisions goes to this extent, but another gives the statutes a much more limited effect. It is said, that a statute which enables her to use and enjoy does not enable her to dispose of;<sup>13</sup> that one which enables her to hold does not enable her to deal with;<sup>14</sup> and, even, that she has strictly only those powers expressly given her.<sup>15</sup>

1 See *Cookson v. Toole*, 59 Ill. 515, 519; *Mitchell v. Carpenter*, 50 Ill. 470, 521; *Williams v. Hugunin*, 69 Ill. 214, 219; 18 Am. Rep. 607; *Parent v. Calleraud*, 64 Ill. 97, 99; *Scott*, 13 Ind. 225, 227; *Smith v. Howe*, 31 Ind. 233, 234; *Brown v. Fifield*, 4 Mich. 322, 327; *Wieman v. Anderson*, 42 Pa. St. 311, 317, 318; *Mahon v. Gormley*, 24 Pa. St. 80; *Krouskop v. Shontz*, 51 Wis. 204, 214; *Meyers v. Rahte*, 46 Wis. 655, 658; *post*, § 372.

2 *Beard v. Redolph*, 29 Wis. 136, 141.

3 *Beal v. Warren*, 2 Gray, 447, 459; *Beard v. Redolph*, 29 Wis. 136, 141; *post*, § 236.

4 *Beard v. Redolph*, 29 Wis. 136, 141.

5 *Beard v. Redolph*, 29 Wis. 136, 141.

6 *Leonard v. Rogan*, 20 Wis. 540, 542; *post*, §§ 362, 363.

7 *Cookson v. Toole*, 59 Ill. 515, 520.

8 *Mitchell v. Carpenter*, 50 Ill. 470, 521.

9 *Mitchell v. Carpenter*, 50 Ill. 470, 521; *post*, § 235.

10. *Mitchell v. Carpenter*, 50 Ill. 470, 521. Consult *Wieman v. Anderson*, 42 Pa. St. 311, 317.

11 *Parent v. Calleraud*, 64 Ill. 97, 99; *Mitchell v. Carpenter*, 50 Ill. 470, 521; *Vandevoort v. Gould*, 36 N. Y. 639, 643.

12 *Williams v. Hugunin*, 69 Ill. 214, 219; 18 Am. Rep. 607; *post*, § 237.

13 *Parent v. Calleraud*, 63 Ill. 97, 99; *Cole v. Van Riper*, 44 Ill. 58; *Swift v. Luce*, 27 Me. 235, 238; *Naylor v. Field*, 21 N. J. L. 287, 288; *Moore v. Cornell*, 63 Pa. St. 320, 322; *post*, § 236.



14 Vreeland, 16 N. J. Eq. 512, 524.

15 Lillard v. Turner, 16 Mon. B. 374, 376; Selzer v. Campbell, 15 S. C. 581, 589; *ante*, § 233.

§ 235. Jurisdiction of equity over statutory separate estate of married women—Trustee, etc.—Under some statutes the husband is made trustee of his wife's statutory separate estate,<sup>1</sup> but otherwise she has the full legal title thereto.<sup>2</sup> Accordingly, it is held that her charges thereupon are valid at law,<sup>3</sup> and that her remedies and liabilities relating thereto are to be asserted or enforced in courts of law.<sup>4</sup> But here, as all through this subject, there is a contrary view; in some cases it is held that a married woman cannot, without express statutory authority, sue or be sued as a single woman;<sup>5</sup> and that unless the common-law procedure is conformed to, she must sue or be sued in equity.<sup>6</sup> In most States, however, at present, the statutes expressly state how married women are to sue or be sued.<sup>7</sup>

1 Alexander v. Saulsbury, 37 Ala. 375, 377; *ante*, §§ 150, 202.

2 Harding v. Cobb, 47 Miss. 500, 603; *ante*, § 233.

3 Krouskop v. Shontz, 51 Wis. 204, 214. S. P. Mitchell v. Carpenter, 50 Ill. 470, 521; Cookson v. Toole, 59 Ill. 515, 519; Williams v. Huguin, 69 Ill. 214, 219; 18 Am. Rep. 607; Albin v. Lord, 39 N. H. 196, 201; Meyers v. Rahte, 46 Wis. 655, 658.

4 Cookson v. Toole, 59 Ill. 515, 522; *supra*, n. 3.

5 Rogers v. Ward, 8 Allen, 387, 390, 391; King v. Mittalberger, 50 Mo. 182, 185; Johnson v. Cummings, 16 N. J. Eq. 97, 105; Stockton v. Farley, 10 W. Va. 173, 175; 27 Am. Rep. 566. See Jones v. Crosthwaite, 17 Iowa, 393, 402; *post*, §§ 237, 240.

6 Stockton v. Farley, 10 W. Va. 173, 175; 27 Am. Rep. 566; *supra*, n. 5.

7 Discussed *post*, SUITS OF MARRIED WOMEN, §§ 428, *et seq.*

§ 236. Wife's power to dispose of her statutory separate property.—A statute giving a married woman her property with the "same rights and powers as a *femme sole*," gives her the power to dispose of the same as if unmarried,<sup>1</sup> even by power of attorney;<sup>2</sup> but the *jus disponendi* is quite a different thing from the *jus tenendi*,<sup>3</sup> and though it is said to be a necessary incident

of ownership of personalty,<sup>4</sup> the same is said not to apply to realty;<sup>5</sup> and, therefore, though of course there are cases that hold that, unless expressly or impliedly restrained by the statute, a married woman has all the powers of a *femme sole* with respect to her property,<sup>6</sup> the better opinion is, that a married woman is not empowered to dispose of her property by a statute which enables her to "have, hold, and possess the same as if unmarried,"<sup>7</sup> or which says that it shall be "owned, used, and enjoyed by her as if single,"<sup>8</sup> or which gives it to her "separate property with power to devise."<sup>9</sup> In peculiar circumstances, as in the case of merchandise, the power of disposition is a necessary incident to the enjoyment thereof.<sup>10</sup> When, moreover, the statute provides that she may dispose of it in a certain mode, she cannot dispose of it in any other way;<sup>11</sup> nor, except when the statute says that she shall have the same powers over it which she has over her equitable separate estate,<sup>12</sup> can she make a conveyance good in equity though void at law.<sup>13</sup> Her deed when invalid is absolutely void,<sup>14</sup> even if her husband has abandoned her,<sup>15</sup> and cannot be rectified or enforced in equity,<sup>16</sup> even after her husband's death;<sup>17</sup> unless it is valid as her contract to make a deed or as her charge on her estate for the consideration.<sup>18</sup> A general power of disposition includes every form of disposition,<sup>19</sup> for example, a mortgage.<sup>20</sup> But deeds of married woman are fully discussed in another chapter of this work.<sup>21</sup>

1 Beal v. Warren, 2 Gray, 447, 459.

2 Patton v. King, 26 Tex. 635, 636; Beal v. Warren, 2 Gray, 447, 459.

3 Naylor v. Field, 29 N. J. L. 287, 288. S. P. Cole v. Van Riper, 44 Ill. 58; Parent v. Calleraud, 64 Ill. 97, 99; Bressler v. Kent, 61 Ill. 426, 430; 14 Am. Rep. 67; Miller v. Wetherby, 12 Iowa, 415, 422.

4 Brown v. Fifield, 4 Mich. 322, 327; Naylor v. Field, 29 N. J. L. 287, 288; ante, § 205.

5 Naylor v. Field, 29 N. J. L. 287, 288. See Cox v. Wood, 20 Ind. 54, 59; Moore v. McMullin, 23 Ind. 78, 79; ante, § 205.

6 *Harding v. Cobb*, 47 Miss. 599, 603; *S. P. Scott*, 13 Ind. 225, 227; *Jones v. Crosthwaite*, 17 Iowa, 393, 502; *Kimball v. Weippert*, 46 Mo. 532, 536; 2 Am. Rep. 541; *Beard v. Redolph*, 29 Wis. 136, 141.

7 *Swift v. Luce*, 27 Me. 285, 288.

8 *Moore v. Cornell*, 68 Pa. St. 329, 322, 323.

9 *Brown v. Fifield*, 4 Mich. 322, 326.

10 *Wieman v. Anderson*, 42 Pa. St. 311, 317, 318; *ante*, § 234.

11 *Williamson*, 18 Mon. B. 323, 385; *S. P. Staley v. Hamilton*, 19 Fla. 275, 299; *Hartley v. Ferrell*, 9 Fla. 374, 378; *Bressler v. Kent*, 61 Ill. 426, 430; 14 Am. Rep. 67; *Stevens v. Parish*, 29 Ind. 260, 263; *Scott*, 13 Ind. 225, 227; *Grapengether v. Fejervary*, 9 Iowa, 163, 173; *Grove v. Todd*, 41 Md. 643, 649; 20 Am. Rep. 76; *Townsley v. Chapin*, 12 Allen, 476, 479; *Harding v. Cobb*, 47 Miss. 599, 603; *Beckman v. Stanley*, 8 Nev. 257, 261; *Naylor v. Field*, 29 N. J. L. 287, 289; *Armstrong v. Ross*, 20 N. J. Eq. 103, 118, 120; *Miller v. Hine*, 13 Ohio St. 565, 568; *Tillinghast*, 7 R. I. 230, 245.

12 *Hooper v. Smith*, 23 Ala. 639, 642.

13 *Staley v. Hamilton*, 19 Fla. 275, 299; *Miller v. Wetherby*, 12 Iowa, 415, 421; *Williamson*, 18 Mon. B. 323, 385; *supra*, n. 11; *post*, §§ 396-403.

14 *Rogers v. Higgins*, 48 Ill. 211, 216; *Stevens v. Parish*, 29 Ind. 260, 263; *Grapengether v. Fejervary*, 9 Iowa, 163, 173; *Shumaker v. Johnson*, 35 Iowa, 33, 35; *Miller v. Hine*, 13 Ohio St. 565, 568; *supra*, n. 11; *post*, §§ 400-404.

15 *Beckman v. Stanley*, 8 Nev. 257, 261; *post*, § 394. Consult *Stewart M. & D.* § 174; *post*, § 407.

16 *Grapengether v. Fejervary*, 9 Iowa, 163, 174; *supra*, n. 14; *post*, § 404.

17 *Townsley v. Chapin*, 12 Allen, 476, 479.

18 *Frostburg v. Hamill*, 55 Md. 313, 315; *post*, §§ 237, 407.

19 *Smith v. Wilson*, 2 Met. (Ky.) 235, 237.

20 *Hall v. Dotson*, 55 Tex. 520, 524; *Pond v. Carpenter*, 12 Minn. 430, 432, 433.

21 *Post*, §§ 394-408.

§ 237. **Wife's contracts concerning her statutory separate property.**—Separate property acts do not enable a married woman to make personal contracts—this is universally admitted.<sup>1</sup> But three classes of her contracts have been recognized as binding on her statutory separate property:<sup>2</sup> (1) Contracts which would bind her equitable separate property;<sup>3</sup> (2) contracts which are expressly authorized by the statute—as when a statute empowers to make contracts “relating to,” or “with reference to,” her property;<sup>3</sup> (3) contracts which are impliedly authorized by statute—contracts, without the capacity for making which, she could not possess, use,

and enjoy her property as it was intended, under the statute, that she should.<sup>5</sup> On some of these contracts, the remedy is at law,<sup>6</sup> and others, it is in equity;<sup>7</sup> and on still others, there are current remedies at law and in equity.<sup>8</sup> But the remedy and the obligation must be kept quite distinct.<sup>9</sup> Unfortunately, the above distinctions have not been generally recognized or regarded, and it is almost impossible to lay down rules applicable to all the States.<sup>10</sup> The burden is upon the party alleging the liability of the property to show that the contract is one that binds it.<sup>11</sup>

1 O'Dally v. Morris, 31 Ind. 111, 112; McKee v. Reynolds, 26 Iowa, 578, 582; Pond v. Carpenter, 12 Minn. 430, 432; Ames v. Foster, 42 N. H. 381, 385; *ante*, § 15; *post*, § 370.

2 See distinction hinted at: Bressler v. Kent, 61 Ill. 426, 430; 14 Am. Rep. 67; Todd v. Lee, 15 Wis. 365, 380.

3 Johnson v. Cummings, 16 N. J. Eq. 97, 104, 105. See Bedford v. Burton, 106, U. S. 338, 339, 340; Donovan, 41 Conn. 551, 557; Cox v. Wood, 20 Ind. 54, 59; Scott, 13 Ind. 225, 228; Shields v. Keys, 24 Iowa, 298, 313; First v. Haire, 36 Iowa, 443, 446; Wicks v. Mitchell, 9 Kan. 80, 88; Hall v. Eccleston, 37 Md. 510, 520; Pond v. Carpenter, 12 Minn. 430, 432; Doyle v. Orr, 57 Miss. 229, 232; Selph v. Howland, 23 Miss. 264, 267; Pemberton v. Johnson, 46 Mo. 342, 343; Perkins v. Elliott, 22 N. J. Eq. 127, 129; 23 N. J. Eq. 526, 534, 535; Peake v. Lebow, 21 N. J. Eq. 269, 282; Wilson v. Brown, 14 N. J. Eq. 277, 279; Yale v. Dederer, 18 N. Y. 265, 272, 274; Ballin v. Dillaye, 37 N. Y. 35, 37; Corn v. Babcock, 42 N. Y. 613, 628; Patrick v. Littell, 36 Ohio St. 79, 83; Graves v. Phillips, 20 Ohio St. 371, 391; Glass v. Warwick, 40 Pa. St. 140, 145; Hall v. Dotson, 55 Tex. 520, 524; Stockton v. Farley, 10 W. Va. 171, 175; 27 Am. Rep. 566; Radford v. Carville, 13 W. Va. 573, 661, 674. See cases *ante*, §§ 206, 207; *post*, § 238.

4 Marshall v. Berry, 13 Allen, 43, 45; Plumer v. Lord, 5 Allen, 460, 462; West v. Laraway, 28 Mich. 464, 465; Batchelder v. Sargent, 47 N. H. 262, 264; Bailey v. Pearson, 29 N. H. 77, 85; *post*, § 239.

5 Williams v. Hugunin, 69 Ill. 214, 219; Cookson v. Toole, 59 Ill. 517, 519; Mitchell v. Carpenter, 50 Ill. 470, 521; Smith v. Howe, 31 Ind. 233, 234; Lindley v. Cross, 31 Ind. 106; Duren v. Getchell, 55 Me. 241, 248; Albin v. Lord, 39 N. H. 196, 201, 202; Freeking v. Rolland, 53 N. Y. 422, 425; Mahon v. Gormley, 24 Pa. St. 80; Wieman v. Anderson, 42 Pa. St. 311, 317, 318; Krouskop v. Shontz, 51 Wis. 204, 214; Meyers v. Rahte, 46 Wis. 655, 658; Beard v. Redolph, 29 Wis. 136, 141; Leonard v. Rogan, 20 Wis. 540, 542; Todd v. Lee, 15 Wis. 365, 368; *post*, § 239.

6 Leonard v. Rogan, 20 Wis. 540, 542; *post*, § 241.

7 Stockton v. Farley, 10 W. Va. 171, 175; 27 Am. Rep. 566; *post*, § 241.

8 Phillips v. Graves, 20 Ohio St. 371, 389; 5 Am. Rep. 675. See Bradford v. Greenway, 17 Ala. 797; Johnson v. Cummings, 16 N. J. Eq. 97, 106; Todd v. Lee, 15 Wis. 365, 368; *post*, § 241.

9 Maclay v. Love, 25 Cal. 367, 382; *post*, § 241.

10 See more fully *post*, §§ 238, 239, 241.

11 *Tracy v. Keith*, 11 Allen, 214, 215; *West v. Laraway*, 28 Mich. 464, 467; *Pollen v. James*, 45 Miss. 129, 133; *post*, § 357.

§ 238. **Wife's contracts as equitable charges upon her statutory separate estate.**—When a separate property act gives a married woman capacity to make certain specified contracts with respect to her property, or to charge or encumber it only by contract executed with certain formalities, it impliedly restrains her from making any others, or any without such formalities, even in equity;<sup>1</sup> but the fact that courts of law imply from the terms of a statute a limited capacity to contract, does not necessarily prevent courts of equity from recognizing some further capacity.<sup>2</sup> And, though some courts have taken, as it is believed, the true ground, that equity has nothing to do with statutory separate property,<sup>3</sup> the majority have held, that statutory estate is bound by her contracts in equity precisely as it would have been had it been created by a deed to her sole and separate use instead of by a statute.<sup>4</sup> Whether a particular contract is binding on particular statutory separate estate, depends on the rule<sup>5</sup> which would determine in the State where it was made,<sup>6</sup> whether the said contract would be binding on an equitable separate estate.<sup>7</sup> Thus, in New Jersey the contract must be beneficial to her, or must be an express charge;<sup>8</sup> in Kansas, any contract is irrebuttably presumed to have been intended as a charge and to be binding,<sup>9</sup> etc.<sup>10</sup> Two limitations to this liability have been recognized: (1) She cannot charge unless she can convey<sup>11</sup>—a rule which has been questioned,<sup>12</sup> but which prevails as to equitable separate estate;<sup>13</sup> (2) if her husband's consent to her conveyances is required, any contract of hers to be a charge must be made with his consent<sup>14</sup>—a rule also questioned.<sup>15</sup>

There are cases, as suggested above, which deem charges as indirect conveyances, and will not recognize them unless executed with all the formalities required of a conveyance.<sup>16</sup> A power to convey always includes a power to charge.<sup>17</sup>

1 *Staley v. Hamilton*, 19 Fla. 275, 295; *Lillard v. Turner*, 16 Mon. B. 374, 376. See *Tracy v. Keith*, 11 Allen, 214, 215; *Robertson v. Bruner*, 21 Miss. 242, 244; *Whitworth v. Carter*, 43 Miss. 61, 71, 72; *Dunbar v. Meyer*, 43 Miss. 679, 685; *infra*, n. 3. *Contra*, *Donovan*, 41 Conn. 551, 557; *Graves v. Phillips*, 20 Ohio St. 371, 391; 5 Am. Rep. 775; *infra*, n. 4.

2 *Todd v. Lee*, 15 Wis. 365, 380. See *Jones v. Crosthwaite*, 17 Iowa, 303, 403, 404.

3 *Maclay v. Love*, 25 Cal. 367, 382; *West v. Laraway*, 23 Mich. 464, 465; *Cain v. Bunkley*, 35 Miss. 119, 145; *supra*, n. 1.

4 *Perkins v. Elliott*, 22 N. J. Eq. 127, 129; 23 N. J. Eq. 526, 534; cases collected *ante*, § 237, n. 3.

5 Rules discussed, *ante*, §§ 206, 207.

6 *Ante*, § 37.

7 *Scott*, 13 Ind. 225, 228; *supra*, n. 4. But see *Staley v. Hamilton*, 19 Fla. 275, 296.

8 *Perkins v. Elliott*, 23 N. J. Eq. 526, 534.

9 *Wicks v. Mitchell*, 9 Kan. 80, 87.

10 See cases cited *ante*, §§ 206, 207.

11 *Bressler v. Kent*, 61 Ill. 426, 430; 14 Am. Rep. 67; *Berry v. Bland*, *Smedes & M.* 77, 83, 84; *Pond v. Carpenter*, 12 Minn. 430.

12 2 Bish. M. W. § 212.

13 *Ante*, § 206

14 *Radford v. Carwile*, 13 W. Va. 573, 674. See *Hall v. Eccleston*, 37 Md. 510, 520; *Selph v. Howland*, 23 Miss. 264, 267.

15 2 Bish. M. W. § 212.

16 *Staley v. Hamilton*, 19 Fla. 275, 295; *ante*, § 236.

17 *Hall v. Dotson*, 55 Tex. 520, 524; *ante*, § 236.

§ 239. Wife's contracts binding on her statutory separate estate by virtue of the statutes.—When the separate property act authorizes a married woman to make contracts "relating to," or "with respect to," or "with reference to," her separate property,<sup>1</sup> the question is, what contracts do so relate, etc.? Whether a contract for the purchase money of certain property is a contract relating to that property is disputed.<sup>2</sup> But contracts for the cultivation,<sup>3</sup> improvement,<sup>4</sup> stocking,<sup>5</sup> supply-

ing with tools,<sup>6</sup> or with work horses,<sup>7</sup> of her separate farm, are contracts relating thereto; so is a contract for furniture for her house;<sup>8</sup> but not a contract for supplies for the family,<sup>9</sup> or for the purchase of a saddle horse.<sup>10</sup> So a contract providing for damages for an injury to her property, is a contract with reference thereto.<sup>11</sup> When the wife's capacity to contract with reference to her separate property is implied from her capacity to hold, use, and enjoy the same, as being involved therein,<sup>12</sup> the question is, what contracts are necessary and proper to render her tenure, use, and enjoyment of the property as full and beneficial as was intended?<sup>13</sup> Whether, when she may acquire by purchase, she may buy on credit, is disputed;<sup>14</sup> but, if she may trade, she may buy a bill of goods on credit,<sup>15</sup> and may make all contracts in the usual course of business.<sup>16</sup> If she may earn for her own use, she may buy a sewing machine to do her sewing on,<sup>17</sup> or a piano to give lessons on.<sup>18</sup> She may employ counsel to litigate her rights to her property;<sup>19</sup> she may employ servants and laborers thereupon;<sup>20</sup> she may lease it,<sup>21</sup> make contracts for its cultivation,<sup>22</sup> repair, etc.,<sup>23</sup> and for disposing of its produce.<sup>24</sup> Whatever is essential to make its use beneficial, she may do.<sup>25</sup> These contracts, it must be remembered, are not binding on her personally,<sup>26</sup> but they are enforced against her property,<sup>27</sup> in some States by a suit at law,<sup>28</sup> in others by a proceeding in equity.<sup>29</sup>

1 *Marshall v. Berry*, 13 Allen, 43, 45; *ante*, § 237.

2 *Pro. Labaree v. Colby*, 99 Mass. 539, 560. *Contra*, *Jones v. Crosthwaite*, 17 Iowa, 393, 402; *Miller v. Albertson*, 73 Ind. 343, 345; *ante*, § 223.

3 *Batchelder v. Sargent*, 47 N. H. 262, 264.

4 *Burr v. Swan*, 118 Mass. 588, 589; *Batchelder v. Sargent*, 47 N. H. 262, 264, 266.

5 *Batchelder v. Sargent*, 47 N. H. 262, 264, 266.

6 *McCormick v. Holbrook*, 22 Iowa, 487, 489; *Batchelder v. Sargent*, 47 N. H. 262, 264.

- 7 Mitchell v. Smith, 32 Iowa, 484, 487.
- 8 Harmon v. Garland, 1 Mackey, 1.
- 9 Schneider v. Garland, 1 Mackey, 350.
- 10 McDermott v. Garland, 1 Mackey, 496.
- 11 Duren v. Getchell, 55 Me. 241, 248.
- 12 Krouskop v. Shontz, 51 Wis. 204, 214 ; Cookson v. Toole, 59 Ill. 515, 519 ; Batchelder v. Sargent, 47 N. H. 262, 266 ; *ante*. § 237, n. 5.
- 13 Meyers v. Rahte, 46 Wis. 655, 658.
- 14 *Pro. Tiemeyer v. Turnquist*, 85 N. Y. 516, 521 ; 39 Am. Rep. 674. See cases *ante*, § 224.
- 15 Trieber v. Stover, 30 Ark. 727, 730 ; Krouskop v. Shontz, 51 Wis. 204, 217.
- 16 Plumer v. Lord, 5 Allen, 460, 462 ; Frecking v. Rolland, 53 N. Y. 422-425.
- 17 Williamson v. Dodge, 5 Hun, 498, 499 ; Dayton v. Walsh, 47 Wis. 113, 120 ; 32 Am. Rep. 757.
- 18 Dayton v. Walsh, 47 Wis. 113, 120 ; 32 Am. Rep. 757.
- 19 Leonard v. Rogan, 20 Wis. 540, 542 ; *post*. §§ 362, 363.
- 20 Cookson v. Toole, 59 Ill. 515, 520.
- 21 Parent v. Calleraud, 64 Ill. 97, 99.
- 22 Mitchell v. Carpenter, 50 Ill. 470.
- 23 Beard v. Redolph, 29 Wis. 136, 141.
- 24 Mitchell v. Carpenter, 50 Ill. 470.
- 25 Batchelder v. Sargent, 47 N. H. 262, 266 ; citations *supra*. n. 12.
- 26 Doyle v. Orr, 57 Miss. 229, 232 ; *ante*, § 237.
- 27 Johnson v. Cummings. 16 N. J. Eq. 97, 104, 105.
- 28 Cookson v. Toole, 59 Ill. 515, 519 ; *post*, § 242.
- 29 Stockton v. Farley, 10 W. Va. 171, 175 ; 27 Am. Rep. 566 ; *post*, § 242.

§ 240. *Wife's wills of statutory separate estate.*—Whether a statute enabling a married woman to hold her property as if sole, enables her to will, is doubtful;<sup>1</sup> but a statute enabling her to hold and convey does not.<sup>2</sup> Though the right to will is an incident to ownership,<sup>3</sup> a married woman cannot, it is said, will her statutory separate estate without express authority ;<sup>4</sup> the same rule has been laid down by many courts, as to equitable separate property.<sup>5</sup> She may will under an express statute,<sup>6</sup> and may, under such a statute, will statutory separate estate, although it was passed before any separate property act.<sup>7</sup> Wills of married women are discussed in another chapter of this work.<sup>8</sup>



1 *Pro. Naylor v. Field*, 29 N. J. L. 287, 288. See *post*, § 346.

2 *Harker v. Elliott*, 3 Har. (Del.) 51, 59.

3 *Cavanaugh v. Anichbacker*, 36 Ga. 500, 506.

4 *Cain v. Bunkley*, 35 Miss. 119, 145.

5 *Wilkinson v. Wright*, 6 Mon. B. 576, 577 ; *ante*, § 208.

6 *Silsby v. Bullock*, 10 Allen, 94, 95.

7 *Emmert v. Hays*, 89 Ill. 11, 16.

8 *Post*, §§ 340-354.

§ 241. **Wife's remedies concerning her statutory separate property.**—How a married woman shall enforce her rights arising out of her statutory separate property is usually fixed by statute,<sup>1</sup> and is discussed under "Suits of Married Women";<sup>2</sup> when she may, by statute, sue as if sole, she cannot sue in equity unless an unmarried woman could.<sup>3</sup>

1 See Md. R. C. 1878, p. 482, § 22.

2 See *post*, §§ 427, *et seq.*

3 *Frazier v. White*, 49 Md. 1, 8 ; *post*, § 446.

§ 242. **Liabilities of statutory separate property.**—A married woman's statutory separate property is liable, with her other property, for her torts ;<sup>1</sup> this was true at common law.<sup>2</sup> It is also liable on any contract which falls within the classes already discussed as binding it ;<sup>3</sup> the main question being, is the remedy at law or in equity ? Those contracts which bind it on the ground that it is treated as equitable separate property,<sup>4</sup> are enforced in equity ;<sup>5</sup> those which render it liable by virtue of the statute,<sup>6</sup> are usually enforced at law,<sup>7</sup> the statutes themselves sometimes determining the form of the remedy.<sup>8</sup> It is not liable for the debts or on the contracts of the husband,<sup>9</sup> unless he acted as the wife's agent in fact.<sup>10</sup> Whether her lands are bound by mechanics' liens, depends upon circumstances ;<sup>11</sup> the lien is to secure a debt arising out of a contract by the owner, and the contract must therefore be made by the wife,<sup>12</sup> and be valid ;<sup>13</sup> it is sufficient if it is valid in

equity.<sup>14</sup> Remedies against the property of married women are more fully discussed in the chapter on "Suits of Married Women."<sup>15</sup>

1 Howard v. North, 5 Tex. 290, 299; *ante*, § 66; *post*, § 458.

2 *Ante*, § 66; *post*, §§ 421-424.

3 *Ante*, § 237.

4 Johnson v. Cummings, 16 N. J. Eq. 97, 104, 105; *ante*, § 238.

5 Wicks v. Mitchell, 9 Kan. 80, 87; Rogers v. Ward, 8 Allen, 387, 390, 391; Pond v. Carpenter, 12 Minn. 430, 432; King v. Mittelberger, 56 Mo. 182, 185; Johnson v. Cummings, 10 N. J. Eq. 97, 105; Perkins v. Elliott, 22 N. J. Eq. 127, 129; 23 N. J. Eq. 526, 535; Graves v. Phillips, 20 Ohio St. 371, 291; 5 Am. Rep. 566; Glass v. Warwick, 40 Pa. St. 140, 145; Stockton v. Farley, 10 W. Va. 171, 175; 27 Am. Rep. 566.

6 *Ante*, § 238.

7 Cookson v. Toole, 59 Ill. 515, 522; Mitchell v. Carpenter, 50 Ill. 470, 521; Williams v. Hugunin, 69 Ill. 214, 219; 18 Am. Rep. 607; West v. Laraway, 28 Mich. 464, 470; Batchelder v. Sargent, 47 N. H. 262, 264; Krouskop v. Shontz, 51 Wis. 204, 214; Meyers v. Rahte, 46 Wis. 655, 658; Beard v. Redolph, 29 Wis. 136, 141; Leonard v. Rogan, 20 Wis. 540, 542.

8 The statutes of the particular State should be examined.

9 Johnson v. Tutewiler, 35 Ind. 353, 355; *post*, § 243.

10 Hobensack v. Hollman, 17 Pa. St. 407, 414; *ante*, §§ 84, 88.

11 See Rogers v. Phillips, 3 Eng. 366; Johnson v. Tutewiler, 35 Ind. 353, 355; Miller v. Hollingsworth, 33 Iowa, 224; Burdick, 24 Iowa, 418; Greenough v. Wiggington, 2 Greene, 435; Marsh v. Alford, 5 Bush, 342; Pell v. Cole, 2 Met. (Ky.) 282, 244; Jarden v. Pumphrey, 36 Md. 261; Kirby v. Tead, 13 Met. 149, 153; Selph v. Howland, 23 Miss. 264; Gray v. Pope, 35 Miss. 116, 117; Tucker v. Gest, 46 Mo. 339, 341; Hauptman v. Catlin, 20 N. Y. 247, 248; Spinning v. Blackburn, 13 Ohio St. 131; Briggs v. Titus, 7 R. I. 441; Knott v. Carpenter, 3 Head, 542.

12 Burdick v. Moon, 24 Iowa, 418.

13 Kirby v. Tead, 13 Met. 149, 153; Gray v. Pope, 35 Miss. 116, 117.

14 Hauptman v. Catlin, 20 N. Y. 247, 248.

15 *Post*, §§ 428, *et seq.*

§ 243. Rights of husband and his creditors in wife's statutory separate estate. — A husband has the right to possess his wife's property so far as such possession is involved in his full enjoyment of his right of cohabitation;<sup>1</sup> and he has a right of action of his own against a third party who, without his wife's consent, removes her property from their common home;<sup>2</sup> but he cannot sue one who, as her agent, removes her property from his possession;<sup>3</sup> and he cannot sue in his own name for the recovery of her property itself.<sup>4</sup> When

he occupies her property with her, the law does not presume that it is under his control,<sup>5</sup> he does not fall within the definition of "owner" thereof,<sup>6</sup> nor is he liable for a nuisance thereupon, unless he is in some way actively connected with such nuisance.<sup>7</sup> He may labor thereupon as her agent,<sup>8</sup> or even make improvements thereupon,<sup>9</sup> without, in the absence of actual fraud,<sup>10</sup> making it in any way liable for his debts.<sup>11</sup> The general effect of the statutes is to destroy his marriage property rights;<sup>12</sup> but a statute may exempt her property from his debts without destroying his rights therein at all.<sup>13</sup> So, a statute may enable her to receipt for her property, without affecting his common-law right to receipt therefor.<sup>14</sup> He cannot steal her property,<sup>15</sup> though she may, it seems, sue him for torts connected therewith.<sup>16</sup> Unless his curtesy is destroyed by the statute expressly,<sup>17</sup> or by her disposition of her property by virtue of her powers thereover,<sup>18</sup> he has this estate at her death.<sup>19</sup> His creditors have, as a usual thing, no rights whatever against her property,<sup>20</sup> unless she has acquired it from him in fraud of their rights.<sup>21</sup>

1 Walker v. Reamy, 36 Pa. St. 410, 414 ; *ante*, §§ 14, 59.

2 Rogers v. Roberts, 58 Md. 519, 523.

3 Southard v. Piper, 36 Me. 84, 85.

4 Dunnahoo v. Holland, 51 Ga. 147, 149.

5 Fiske v. Bailey, 51 N. Y. 150, 153.

6 Davis v. Dodds, 20 Ohio St. 473.

7 Fiske v. Bailey, 51 N. Y. 150, 153.

8 Miller v. Peck, 22 W. Va. 75, 79-97 ; *ante*, §§ 87, 130.

9 Webster v. Hildreth, 33 Vt. 457, 458 ; *ante*, § 131.

10 Kirby v. Burns, 45 Mo. 234, 235 ; Haswell v. Hill, 47 N. H. 407, 414 ; *ante*, §§ 87, 130, 131.

11 Discussed *ante*, §§ 87, 130, 131.

12 Vreeland, 16 N. J. Eq. 517, 522 ; *ante*, § 150.

13 Logan v. McGill, 8 Md. 461, 470 ; White v. Dorris, 35 Mo. 181, 187, 188.

14 Clark v. Bank, 47 Mo. 17, 19.

15 Thomas, 51 Ill. 162, 165 ; *ante*, § 49.

16 Minier, 4 Lans. 421. But see Crowther, 55 Me. 358, 359; Smith v. Gorman, 41 Me. 405, 408; Jackson v. Parks, 10 Cush. 550; Martin v. Goff, 6 R. I. 92, 96; *ante*, §§ 52-56.

17 Hatfield v. Sneden, 54 N. Y. 280, 287.

18 Johnson v. Cummings, 16 N. J. Eq. 97, 106.

19 See Noble v. McFarland, 51 Ill. 226; Freeman v. Hartman, 45 Ill. 57; Cole v. Van Riper, 44 Ill. 58; Hathon v. Lyon, 2 Mich. 93; Farr v. Sherman, 11 Mich. 33; Tong v. Marvin, 15 Mich. 60; Piper v. Johnston, 12 Minn. 60; Porch v. Fries, 18 N. J. Eq. 204; Hatfield v. Sneden, 54 N. Y. 280, 287; Curry v. Bott, 63 Pa. St. 400; Giddings v. Cox, 31 Vt. 607; *ante*, § 161.

20 Martin v. Goff, 6 R. I. 92, 96.

21 Discussed *ante*, 99-134.

## CHAPTER XIV.

## WIFE'S ESTATE IN HUSBAND'S REALTY — DOWER.

ART. I. NATURE AND INCIDENTS OF DOWER, §§ 244-264.

II. BARRING AND DEFEATING OF DOWER, §§ 265-282.

III. ASSIGNMENT OF DOWER, §§ 283-309.

## ARTICLE I. — NATURE AND INCIDENTS OF DOWER.

- § 244. Meaning of the word "dower."
- § 245. Origin and history of dower.
- § 246. Dower at common law defined.
- § 247. Dower under the statutes.
- § 248. Conflict of laws as to dower.
- § 249. Requisites of dower.
- § 250. Marriage as a requisite of dower.
- § 251. Husband's death as a requisite of dower.
- § 252. Husband's seisin as a requisite of dower.
- § 253. Kinds of property subject to dower.
- § 254. Kinds of estates subject to dower.
- § 255. *Dos de dote peti non debet.*
- § 256. Dower in equitable estates.
- § 257. Dower in partnership estates.
- § 258. Dower and other encumbrances — Priorities.
- § 259. Dower and purchase money.
- § 260. Dower in mortgaged property — How it exists.
- § 261. Dower in mortgaged property — Redemption and foreclosure.
- § 262. Dower before husband's death — Inchoate dower.
- § 263. Dower before assignment.
- § 264. Assigned dower — Incidents of.

§ 244. Meaning of the word "dower." — The word "dower" means generally a certain estate of a wife in the lands of her husband — dower at common law;<sup>1</sup> this estate must be distinguished from a wife's estate as heir.<sup>2</sup> The word is applicable, strictly, only to realty,<sup>3</sup> but in one case it stood so connected in a will, that it was held to cover a share in personalty as well;<sup>4</sup> so it

is made by statute to describe an estate in personalty.<sup>5</sup> It is applicable properly only to an estate of a wife;<sup>6</sup> but here again, statutes have changed its meaning and made it cover an estate of a husband as well.<sup>7</sup>

1 *Guerlin v. Moore*, 25 Minn. 462, 465; *post*, § 246.

2 *Sutherland*, 69 Ill. 481, 489; *Stewart M. & D.* § 457.

3 *Hill v. Mitchell*, 5 Ark. 608, 611. S. P., *Travellers v. Noland*, 97 Ind. 217; *Davis*, 36 Iowa, 24; *Perkins v. Little*, 1 Me. 148; *Brackett v. Leighton*, 7 Me. 383; *Dow*, 36 Me. 211; *Bryant v. McCune*, 49 Mo. 546; *Lamar v. Scott*, 3 Strob. 562.

4 *Woodbury v. Mathewson*, 17 Fla. 778, 783; *Adamson v. Ayres*, 5 N. J. Eq. 349.

5 Ark. Dig. 1874, § 2230; Mo. R. S. 1879, § 2186.

6 *Post*, §§ 246, 247.

7 Ill. R. S. 1880, p. 425, § 1; *Hurleman v. Hazlett*, 55 Iowa, 256.

§ 245. *Origin and history of dower.*—The custom of conferring on a widow for life a portion of her husband's lands, of allowing her dower, is so ancient that neither Coke nor Blackstone could trace it to its source.<sup>1</sup> It is said to have been of German origin,<sup>2</sup> also, to have been brought into England by the Normans.<sup>3</sup> It must be distinguished from the *dos* of the civil law, still known in Louisiana,<sup>4</sup> which consists of a portion brought to the husband by the wife.<sup>5</sup> At first it may have consisted of a gift of personal property from the husband to the wife,<sup>6</sup> but it became later solely an interest in lands.<sup>7</sup> So, too, it was one fourth, one tenth, and one half, before it became settled at one third for life.<sup>8</sup> This result was due to English statutes,<sup>9</sup> which, as a part of the common law, were generally adopted in the United States.<sup>10</sup> But later statutes have much modified common-law dower, both in England and the United States.<sup>11</sup> Five kinds of dower are named by Littleton, namely, dower *ad ostium ecclesiae*, dower *ex assen su patris*, dower by the custom, dower *de la plus beale*, and dower at common law;<sup>12</sup> but only the last named has ever been known in the United States.<sup>13</sup> However obscure its

origin, its object has never been doubted, which was to secure a means of support to the widow and children;<sup>14</sup> and to further this object courts have always favored the widows claim for dower<sup>15</sup>—life, liberty, and dower, being the three things said to have been favored by the common law.<sup>16</sup>

1 Hill v. Mitchell, 5 Ark. 608, 610; Wright v. Jennings, 1 Bail. 277, 278; Combs v. Young, 4 Yerg. 218; 1 Scribner Dow. ch. 1, § 1.

2 See 1 Scribner Dow. ch. 1.

3 See citations *supra*, n. 1.

4 De Young, 6 La. An. 786.

5 2 Blackst. Com. 129; 1 Scribner Dow. ch. 1, § 4.

6 Wright's Ten. 191, 193; 1 Scribner Dow. ch. 1, § 5.

7 1 Scribner Dow. ch. 1, § 7; *post*, §§ 253, 254.

8 1 Scribner Dow. ch. 1, § 7.

9 See discussion in 1 Scribner Dow. ch. 1.

10 *Ante*, § 6; discussed 1 Scribner Dow. ch. 2.

11 *Post*, § 247.

12 Littleton, § 51; 1 Scribner Dow. ch. 1, § 26.

13 1 Scribner Dow. ch. 1, § 30.

14 Banks v. Sutton, 2 P. Wms. 702.

15 Chew, 1 Md. 163, 172, 173. S. P., Co. Litt. 124, b; Banks v. Sutton, 2 P. Wms. 702; Meigs v. Dimock, 6 Conn. 462; Lasher, 13 Barb. 106; Mahon v. Smith, 60 How. Pr. 385.

16 Bacon on Stat. of Uses, ed. 1642, pp. 31, 32; 1 Scribner Dow. ch. 1, § 33.

§ 246. **Dower at common law, defined.**—Dower at common law is the life estate<sup>1</sup> of a wife<sup>2</sup> in one third<sup>3</sup> of all the legal<sup>4</sup> estates of inheritance<sup>5</sup> of which her husband is seized<sup>6</sup> at any time during coverture<sup>7</sup> of a sole,<sup>8</sup> beneficial,<sup>9</sup> and immediate<sup>10</sup> seisin, and which any issue of theirs might directly<sup>11</sup> inherit.<sup>12</sup> This estate has three stages,<sup>13</sup> namely: (1) Its inchoate stage, extending from the time of the marriage or of the acquisition of the property, to the death of the husband;<sup>14</sup> (2) Its consummate stage, extending from the death of the husband;<sup>15</sup> (3) its assigned stage, extending from the time it is set off to the widow.<sup>16</sup> This was the only

marriage estate of a wife in her husband's realty known to the common law.

- 1 See *Orrick v. Boehm*, 49 Md. 72, 101; *Brown v. Collins*, 14 Ark. 421; *post*, § 264.
- 2 *Brooke*, 60 Md. 524, 533, 534; *post*, § 250.
- 3 *Mantz v. Buchanan*, 1 Md. Ch. 202, 208; *post*, §§ 290-296.
- 4 *Gully v. Ray*, 18 Mon. B. 107, 113; *post*, § 255.
- 5 *Bucheridge v. Ingram*, 2 Ves. Jr. 663; *post*, §§ 253, 254.
- 6 *Selsin* discussed, *post*, § 252.
- 7 *Price v. Hobbs*, 47 Md. 359, 378; *post*, § 252.
- 8 *Chew*, 1 Md. 163, 172; *post*, § 252.
- 9 *McCauley v. Grimes*, 2 Gill & J. 318, 324; *post*, § 252.
- 10 *Houston v. Smith*, 88 N. C. 312, 313; *post*, § 252.
- 11 1 *Scribner Dow*, p. 223; *Park Dow*, 80.
- 12 *Spangler v. Stanler*, 1 Md. Ch. 36, 38; *post*, § 254.
- 13 *Moore v. Mayor*, 8 N. Y. 110, 113; 59 Am. Dec. 473; *Wait*, 4 N. Y. 95, 99.
- 14 *Reiff v. Horst*, 55 Md. 42, 47; *post*, § 262.
- 15 *Sutliff v. Forgey*, 1 Cowen, 89, 96; *post*, § 263.
- 16 *Joyner v. Speed*, 68 N. C. 236; *post*, § 264.

§ 247. **Dower under the statutes.**—In California,<sup>1</sup> Colorado,<sup>2</sup> Indiana,<sup>3</sup> Iowa,<sup>4</sup> Kansas,<sup>5</sup> Louisiana,<sup>6</sup> Minnesota,<sup>7</sup> Mississippi,<sup>8</sup> Nevada,<sup>9</sup> and Texas,<sup>10</sup> common-law dower has never existed, or has been abolished, other analogous estates existing in its place. In England,<sup>11</sup> Alabama,<sup>12</sup> Arkansas,<sup>13</sup> Connecticut,<sup>14</sup> Delaware,<sup>15</sup> Florida,<sup>16</sup> Georgia,<sup>17</sup> Illinois,<sup>18</sup> Kentucky,<sup>19</sup> Maine,<sup>20</sup> Maryland,<sup>21</sup> Massachusetts,<sup>22</sup> Michigan,<sup>23</sup> Missouri,<sup>24</sup> Nebraska,<sup>25</sup> New Hampshire,<sup>26</sup> New Jersey,<sup>27</sup> New York,<sup>28</sup> North Carolina,<sup>29</sup> Ohio,<sup>30</sup> Oregon,<sup>31</sup> Pennsylvania,<sup>32</sup> Rhode Island,<sup>33</sup> South Carolina,<sup>34</sup> Tennessee,<sup>35</sup> Virginia,<sup>36</sup> Vermont,<sup>37</sup> West Virginia,<sup>38</sup> and Wisconsin,<sup>39</sup> common-law dower exists in a more or less modified form. In one or more of these latter States the statutes make one or more of the following changes in common-law dower: possession,<sup>40</sup> or right of entry,<sup>41</sup> is substituted for seisin; the interest is made one half instead of one third,<sup>42</sup> dower is given in personal property,<sup>43</sup> in



leaseholds,<sup>44</sup> in remainders,<sup>45</sup> in equitable estates;<sup>46</sup> is limited to such property as the husband is seized of at the time of his death,<sup>47</sup> or such as he has not disposed of by deed or will;<sup>48</sup> modifications which are better understood in connection with the discussions in the following sections.

- 1 Cal. Civ. Code, 1881, § 173; *Beard v. Knox*, 1 Cal. 252.
- 2 Colo. R. S. 1877, § 1751.
- 3 Ind. R. S. 1881, § 2483.
- 4 Iowa, R. S. 1880, § 2440.
- 5 Kan. R. S. 1871, § 2129.
- 6 La. Civ. Code. arts. 2337, *et seq.*
- 7 Minn. R. S. 1878, p. 572.
- 8 Miss. R. S. 1880, §§ 1170, 1171.
- 9 Nev. R. S. 1873, § 157.
- 10 Tex. R. S. 1879, §§ 2352, *et seq.*
- 11 3 and 4 William IV. ch. 105, ch. 27, § 41; 7 and 8 Vict. ch. 66, § 16, 24 Vict. ch. 126, §§ 26, 27.
- 12 Ala. Code, 1876, §§ 2232-2251; *Irvine v. Armistead*, 46 Ala. 363, 371.
- 13 Ark. Dig. 1874, §§ 2210-2243; *McWhirter v. Roberts*, 40 Ark. 233, 237; *Webb v. Smith*, 40 Ark. 17, 23.
- 14 Conn. R. S. 1875, pp. 376, 377.
- 15 Del. R. S. 1874, p. 533.
- 16 Fla. R. S. 1881, pp. 476-480.
- 17 Ga. R. C. 1878, §§ 1763-1771, 4041-4048.
- 18 Ill. R. S. 1880, p. 425.
- 19 Ky. R. S. 1881, p. 527.
- 20 Me. R. S. 1871, p. 706.
- 21 Md. R. C. 1878, p. 397; *Reiff v. Horst*, 55 Md. 42, 47; *Price v. Hobbs*, 47 Md. 359, 381.
- 22 Mass. P. S. 1882, p. 740.
- 23 Mich. R. S. 1882, § 5733.
- 24 Mo. R. S. 1879, §§ 2186-2239, 3290.
- 25 Neb. R. S. 1881, pp. 212-215, 227, 254, 393.
- 26 N. H. R. S. 1878, pp. 474, 475.
- 27 N. J. Rev. 1877, pp. 224, 298, 320-324, 483, 1245.
- 28 N. Y. R. S. 1882, pp. 2197, 2198.
- 29 N. C. Bat. Rev. 1873, pp. 839, 844; *Houston v. Smith*, 88 N. C. 312, 313.
- 30 Ohio R. S. 1880, §§ 4188-4194.
- 31 Oreg. G. L. 1872, pp. 584-587.
- 32 Pa. Purd. Dig. 1876, pp. 55, 56, 529, 530; *Davison*, 95 Pa. St. 394.
- 33 R. I. R. S. 1882 pp. 636-640.

- 34 S. C. R. S. 1882, §§ 1796-1804.
- 35 Tenn. R. S. 1873, §§ 2398-2419.
- 36 Va. Code, 1873, pp. 853-856, 962.
- 37 Vt. R. S. 1880, §§ 2215-2220.
- 38 W. Va. R. S. 1879, pp. 498, 499; Thornbury, 18 W. Va. 522.
- 39 Wis. R. S. 1878, §§ 2159-2163.
- 40 Conn. R. S. 1875, p. 376, § 1.
- 41 3 and 4 Wm. IV. ch. 105, § 2.
- 42 Ala. Code, 1876, § 2233.
- 43 Ark. Dig. 1874, § 2230.
- 44 Mo. R. S. 1879, § 2186.
- 45 Ohio R. S. 1879, § 2186.
- 46 Ill. R. S. 1880, p. 425, § 1; Md. R. C. 1878, p. 397, § 1.
- 47 Ga. R. C. 1878, § 1763; Tenn. R. S. 1873, § 2398.
- 48 3 and 4 Wm. IV. ch. 105, § 4.

§ 248. **Conflict of laws as to dower.**—As a general rule, the existence and incidents of dower are determined by the law of the place where the lands lie,<sup>1</sup> and by the law in force at the time of the husband's death, if he died seized,<sup>2</sup> and by that in force at the time of alienation if he had disposed of the property;<sup>3</sup> for dower is not the result of a contract, but is an institution of the law.<sup>4</sup>

1 Newcomer v. Orem, 2 Md. 297, 305; 56 Am. Dec. 717; *ante*, § 33. S. P., Apperson v. Bolton, 29 Ark. 418; Duncan v. Dick, Walk. (Miss.) 281; Lamar v. Scott, 3 Strob. 562.

2 Riddick v. Walsh, 15 Mo. 519, 538; *ante*, § 33. S. P., Ware v. Owens, 42 Ala. 212; Lucas v. Sawyer, 17 Iowa, 517. Compare Johnson v. Van Dyke, 6 McLean, 422; Moore v. Kent, 37 Iowa, 20; 18 Am. Rep. 1; Kennerly v. Missouri, 11 Mo. 204.

3 O'Farrell v. Simplot, 4 Iowa, 381; Kennerly v. Missouri, 11 Mo. 204.

4 Martin, 22 Ala. 86; Noel v. Ewing, 9 Ind. 37; Higgins v. Breen, 9 Mo. 497, 501; Moore v. Mayor, 8 N. Y. 110, 113; 59 Am. Dec. 473; Norwood v. Morrow, 4 Dev. & B. 442, 450; Weaver v. Gregg, 6 Ohio St. 547; Melizet, 17 Pa. St. 449; 55 Am. Dec. 573.

§ 249. **Requisitos of dower.**—Two things are necessary to the existence of inchoate dower—marriage and seisin;<sup>1</sup> and three things to the consummation of the right of dower—marriage, seisin, and death of husband;<sup>2</sup> to the actual enjoyment of the estate, there is

one other requisite—assignment.<sup>3</sup> Birth of issue is not a requisite;<sup>4</sup> not even the possibility thereof is necessary, and an impotent woman may have dower;<sup>5</sup> but it is said that the woman must be old enough to conceive before her husband's death,<sup>6</sup> though no matter how old she is at the time of marriage, she may have dower.<sup>7</sup> Nor is residence,<sup>8</sup> or citizenship,<sup>9</sup> any longer, in general, a requisite of dower.

1 Denton v. Nanny, 8 Barb. 613, 620; Price v. Hobbs, 47 Md. 359, 381; *ante*, § 246; *post*, § 262.

2 King, 61 Ala. 479, 481; Stevens v. Smith, 4 Marsh. J. J. 64; 20 Am. Dec. 205; Wait, 4 N. Y. 95, 99; 1 Greenl. Cruise, 154; *ante*, § 246; *post*, § 263.

3 Moore v. Mayor, 8 N. Y. 110, 113, 114; 50 Am. Dec. 473; *ante*, § 246; *post*, §§ 264, 283-300.

4 1 Scribner Dow. 223.

5 1 Scribner Dow. 223.

6 Park Dow. 81; 1 Scribner Dow. 223.

7 2 Blackst. Com. 131; Co. Litt. 40 a.

8 Pratt v. Tefft, 14 Mich. 191, 193. See Sewall v. Lee, 9 Mass. 363.

9 See Vict. ch. 14 § 2; Sharp v. St. Sauveur, Law R. 7 Ch. 343; Congregational v. Morris, 8 Ala. 182; Etheridge v. Malempre, 18 Ala. 565; Forrester, 39 Ala. 320; Ark. Dig. 1874, § 2211; Sistare, 2 Root, 468; Whiting v. Stevens, 4 Conn. 44; Headman v. Rose, 63 Ga. 453; Ill. R. S. 1880, p. 425, § 2; State v. Blackmo, 8 Blackf. 246; Eldon v. Doe, 6 Blackf. 341; Alsberry v. Hawkins, 9 Dana, 177; 33 Am. Dec. 546; Moore v. Tisdale, 5 Mon. B. 352; Mussey v. Pierce, 24 Me. 559; Potter v. Titcomb, 22 Me. 539; Buchanan v. Deshon, 1 Har. & G. 280; Sewall v. Lee, 9 Mass. 363; Fox v. Sonthack, 12 Mass. 143; Foss v. Crips, 20 Pick. 121; Piper v. Richardson, 9 Met. 155; Mich. R. S. 1882, § 5753; Stokes v. Fallon, 2 Mo. 32; Colgan v. McKeown, 4 Zab. 566; Sutliff v. Forgey, 1 Cowen. 83; 5 Cowen, 713; Priest v. Cummings, 16 Wend. 617; 20 Wend. 338; Burton, 26 How. Pr. 474; 1 Abb. App. Dec. 271; Hall, 82 N. Y. 130; Reese v. Waters, 4 Watts & S. 145; Bennet v. Harris, 51 Wis. 251; 1 Scribner Dow. ch. 9.

§ 250. **Marriage as a requisite of dower.**—The woman must be the lawful wife of the man in whose property she claims dower;<sup>1</sup> and, in the absence of statute<sup>2</sup> she must be his wife at the time of his death.<sup>3</sup> Some authorities seem to hold that the marriage must be not only valid,<sup>4</sup> but legal and solemnized in *facie ecclesiar* as well.<sup>5</sup> But in the United States, at least, a valid marriage makes the parties husband and wife to all intents and purposes,<sup>6</sup> and a marriage by consent—*per verba*

*de præsenti*—if valid, is sufficient to give dower;<sup>8</sup> the fact that her husband has refused to consummate the marriage makes no difference.<sup>9</sup> Nor does it affect her right that the marriage took place in some other State or country.<sup>10</sup> In suits respecting dower rights, marriage may be proved as in other civil cases,<sup>11</sup> by cohabitation and repute.<sup>12</sup> If the marriage is voidable and not avoided, dower exists;<sup>13</sup> but a void marriage cannot give dower.<sup>14</sup> In a case in Kentucky where a married man had imposed on a woman and had married her, and dower had been allotted her, his heirs were not allowed in equity to deprive her thereof.<sup>15</sup>

1 Park Dow. 7; Coke Litt. 31 a; 1 Roper H. & W. 333; 1 Scribner Dow. ch. 3; Jones, 28 Ark. 19, 21; Denton v. Nanny, 8 Barb. 618, 620; Moore v. Mayor, 8 N. Y. 110, 114; 59 Am. Dec. 473.

2 Allowing dower on divorce: Stewart M. & D. § 446; *post*, § 262.

3 McCraney, 5 Iowa, 232, 250; Stewart M. & D. § 446.

4 Valid and legal distinguished: Stewart M. & D. §§ 5, 49, 152.

5 Shelford M. & D. 35, 36; 2 Kent. Com. 87, n. a; Dalrymple, 2 Hagg. Con. 51, 63; 1 Scribner Dow. ch. 6.

6 See 1 Scribner Dow. ch. 6, § 12.

7 Pearson v. Howey, 6 Halst. 12, 13, 21; Stewart M. & D. § 86.

8 Adams, 57 Miss. 267, 263; Donnelly, 8 Mon. B. 113; Stewart M. & D. § 88.

9 Brooke, 60 Md. 524, 534; Stewart M. & D. § 104.

10 Ilderton, Black. H. 145; Moore v. Mayor, 8 N. Y. 110, 114; 59 Am. Dec. 473.

11 Jones, 28 Ark. 19, 22, 25, 26; Stewart M. & D. § 136.

12 Carter v. Parker, 23 Me. 509, 510; Stewart M. & D. §§ 132, 136.

13 Higgins v. Breen, 9 Mo. 497, 501; Litt. § 36; 1 Greenl. Cruise, 154; 1 Scribner Dow. ch. 8.

14 Higgins v. Breen, 9 Mo. 497, 501. S. P., Jenkins, 2 Dana, 102; 26 Am. Dec. 437; Smart v. Whaley, 6 Smedes & M. 308; 1 Scribner Dow. ch. 7, § 3.

15 Donnelly, 8 Mon. B. 113.

§ 251. Husband's death as a requisite of dower.—The husband's death must occur before that of the wife in order that her right of dower may be consummate,<sup>1</sup> vested,<sup>2</sup> absolute.<sup>3</sup> And it must be a natural death; civil death does not give dower,<sup>4</sup> nor is an absolute divorce the equivalent of death in this connection.<sup>5</sup>

His death may be presumed from his long absence,<sup>6</sup> and may be proved in the usual ways<sup>7</sup>—for example, by reputation in the family.<sup>8</sup>

1 Litt. § 36; Park Dow. 247; Wait, 4 N. Y. 95, 99; *ante*, § 249; *post*, § 263.

2 Thornbury, 18 W. Va. 522; *post*, §§ 263, 264.

3 Sutliff v. Forgey, 1 Cowen, 89, 96; *post*, §§ 263, 264.

4 Woolbridge v. Lucas, 7 Mon. B. 49, 51. See Litt. 33 b, 132 b; Platner v. Sherwood, 6 Johns. Ch. 129; 1 Scribner Dow. 650; Stewart M. & D. § 175.

5 Stewart M. & D. § 446.

6 Stewart M. & D. § 474. See Foulks v. Rhea, 7 Bush, 568; Woods, 2 Bay, 476.

7 See Moors v. De Bervales, 1 Russ. 300; Newman v. Jenkins, 10 Pick. 515.

8 Cochrane v. Libby, 18 Me. 39, 42.

§ 252. The husband's seisin as a requisite of dower.—The husband must be seized of property before any dower rights can attach thereto.<sup>1</sup> This rule was very strictly enforced at common law.<sup>2</sup> A mere right of entry into land held by another under claim of title was not enough,<sup>3</sup> nor was a judgment before execution,<sup>4</sup> though this has been changed in England by statute,<sup>5</sup> and perhaps in this country by construction,<sup>6</sup> actual ownership being equivalent to seisin.<sup>7</sup> The rule as to technical seisin does not apply to incorporeal hereditaments.<sup>8</sup> Seisin in law is as effective as seisin in fact or deed, to give dower.<sup>9</sup> Possession under a warranty deed is *prima facie* evidence of seisin;<sup>10</sup> and the deed under which land is held need not be recorded to give seisin,<sup>11</sup> except, perhaps, where there is no dower in equitable estates,<sup>12</sup> and under the terms of certain registry acts, as against *bona fide* creditors and purchasers;<sup>13</sup> nor is one seized of land which he has conveyed away by an unrecorded deed,<sup>14</sup> or by a deed which is fraudulent as against creditors, such deed being merely voidable by them.<sup>15</sup> Wrongful seisin is sufficient to give the wife dower as against her hus-

band's heirs and assigns.<sup>16</sup> The seisin must be beneficial,<sup>17</sup> the husband must be seized for his own use.<sup>18</sup> A wife has no dower in lands held by her husband as administrator<sup>19</sup> or trustee;<sup>20</sup> but if really beneficial, it makes no difference how short a time it lasts;<sup>21</sup> still if in one transaction, though by different deeds, the title passes in and out of the husband, as when property is purchased and a mortgage is given for the purchase money,<sup>22</sup> the seisin is merely transitory and no right to dower attaches,<sup>23</sup> even though there be considerable delay before the execution of the retransfer,<sup>24</sup> and though this be made to a third party.<sup>25</sup> The seisin must be sole;<sup>26</sup> there is no dower in joint estates,<sup>27</sup> though there is in estates in common<sup>28</sup> and in coparcenary;<sup>29</sup> but if the joint estate is destroyed by any other means than the husband's assignment,<sup>30</sup> dower attaches.<sup>31</sup> The husband must have the immediate seisin of the inheritance;<sup>32</sup> it will not suffice, for example, if he is seized of a life estate and is entitled to the inheritance after another life estate;<sup>33</sup> there is no dower in reversions and remainders after a freehold estate.<sup>34</sup> The seisin must exist at some time during the coverture;<sup>35</sup> but it need not, except by statute,<sup>36</sup> exist at the time of his death;<sup>37</sup> it is sufficient though he part with it on the day of his marriage immediately after the ceremony;<sup>38</sup> but if he give a bond of conveyance before marriage and convey in accordance therewith after the marriage, the second conveyance dates back to the time of the bond, and there is no dower;<sup>39</sup> nor is it sufficient if he is seized after a divorce *a vinculo*.<sup>40</sup>

1. *Houston v. Smith*, 88 N. C. 312, 313. S. P., *Butler v. Cheatham*, 8 Bush, 594; *Atwood*, 22 Pick. 283; *Durando*, 23 N. Y. 331; *Leach*, 21 Hun, 381; *Poor v. Horton*, 15 Barb. 485; *Galbraith v. Greene*, 13 Serg. & R. 85; *Pretts v. Richey*, 29 Pa. St. 71; *ante*, § 249.

2. 1 Scribner Dow. 249; *Park Dow.* 24.

3. *Winnington*, 2 Cold. 59, 60; *Thompson*, 1 Jones, 430, 431; *Beardslee*, 5 Barb. 324; *Perkins*, §§ 366-369; 1 Scribner Dow. 255-257.

4 Witham v. Lewis, 1 Wils. 48, 55; Shelley, 4 Brown Parl. C. 510; Park Dow. 26; 1 Scribner Dow. 257.

5 3 and 4 Wm. IV. ch. 105, § 2; *ante*, § 247.

6 See Borland v. Marshall, 2 Ohio St. 308, 313.

7 McClure v. Harris, 12 Mon. B. 261, 266; Reed v. Morrison, 12 Serg. & R. 18, 21.

8 1 Scribner Dow. 267.

9 Stevens v. Smith, 4 Marsh. J. J. 64, 65; 20 Am. Dec. 205. S. P., Green v. Siter, 8 Cranch, 247; Bowen v. Collins, 15 Ga. 100; Denis, 7 Blackf. 572; Moun v. Edson, 39 Me. 25; Chew, 1 Md. 163, 172; Atwood, 22 Pick. 283; Green v. Chelsea, 24 Pick. 78; Ware v. Washington, 6 Smedes & M. 737; Houston v. Smith, 88 N. C. 312, 313; Borland v. Marshall, 2 Ohio St. 308; Welch v. Buckins, 9 Ohio St. 331; Secrest v. McKenna, 6 Rich. Eq. 72. Compare CURTESY, *ante*, § 155.

10 Wheeler v. Smith, 50 Mich. 93, 94.

11 Pickett v. Lyles, 5 S. C. 275, 278. S. P., Kirby v. Vantree, 26 Ark. 368, 370; Sulton v. Jervis, 31 Ind. 265, 268; Johnston v. Miller, 40 Ind. 376; 17 Am. Rep. 699; Tyson v. Harrington, 6 Ired. Eq. 329, 332.

12 See Kirby v. Vantree, 26 Ark. 368, 370; *post*, § 255.

13 Stribling v. Ross, 16 Ill. 122, 124; Talbot v. Armstrong, 14 Ind. 254, 256.

14 Blood, 23 Pick. 80, 84; Thomas, 10 Ired. 123, 124; Norwood v. Morrow, 4 Dev. & B. 442, 449; Chester v. Greer, 5 Humph. 26, 30.

15 King, 61 Ala. 479, 481; Withed v. Mallory, 4 Cush. 133, 140.

16 Toomey v. McLean, 105 Mass. 122; Randolph v. Doss, 3 How. (Miss.) 205; Hitchcock v. Harrington, 6 Johns. 293; 5 Am. Dec. 229; Park Dow. 37; 1 Scribner Dow. 268.

17 Johnson v. Plume, 77 Ind. 166, 171; McCauley v. Grimes, 2 Gill & J. 318, 325; 20 Am. Dec. 434.

18 Gully v. Ray, 18 Mon. B. 107, 114.

19 Tillman v. Spann, 68 Ala. 102, 106.

20 Cowman v. Hall, 3 Gill & J. 398, 405.

21 Boughton v. Randall, Noy, 64; Sutherland, 69 Ill. 481, 486; Johnson v. Plume, 77 Ind. 166, 171; Stanwood v. Dunning, 14 Me. 280, 294; McCauley v. Grimes, 3 Gill & J. 318, 324; 20 Am. Dec. 434; Rawlings v. Lowndes, 34 Md. 639, 646; Smith v. McCarty, 119 Mass. 519, 520.

22 Fontaine v. Boatmen's, 57 Mo. 552, 558; *post*, §§ 259-261.

23 Johnson v. Plume, 77 Ind. 166, 171; McClure v. Harris, 12 Mon. B. 261, 266; Gully v. Ray, 18 Mon. B. 107, 114; Gage v. Ward, 25 Me. 101, 103; Glenn v. Clark, 53 Md. 580, 605, 609; Rawlings v. Lowndes, 34 Md. 639, 643; Holbrook v. Finney, 4 Mass. 566, 569; 3 Am. Dec. 243; Clark v. Monroe, 14 Mass. 352; Fontaine v. Boatmen's 57 Mo. 552, 558; Moore v. Esty, 5 N. H. 479; Stow v. Tift, 15 Johns. 459; 8 Am. Dec. 266; Gilbain v. Moore, 4 Leigh, 30, 32; 24 Am. Dec. 704; *post*, §§ 259, 260.

24 Wheatley v. Calhoun, 12 Leigh, 264, 274; 37 Am. Dec. 654; *post*, §§ 259, 260.

25 Glenn v. Clark, 53 Md. 580, 605, 606; *post*, §§ 259, 260.

26 Maybury v. Brien, 15 Peters, 21, 37; Cockerill v. Armstrong, 31 Ark. 580, 584; Chew, 1 Md. 163, 172.

27 Maybury v. Brien, 15 Peters, 21, 37. S. P., Cockerill v. Armstrong, 31 Ark. 580, 584; Davis v. Logan, 9 Dana, 186; Chew, 1 Md. 163, 172;

Holbrook v. Finney, 4 Mass. 386; 3 Am. Dec. 243; Weir v. Tate, 4 Ired. Eq. 264; Tuboe v. Wiseman, 2 Ohio St. 207; Walker, 6 Cold. 571; *post*, § 254.

28 Lee v. Lindell, 21 Mo. 202, 206. S. P., Sutton v. Rolfe, 3 Lev. 84; Harvill v. Holloway, 24 Ark. 18; Ross v. Wilson, 58 Ga. 249; Rank v. Hanna, 6 Ind. 20; Davis v. Logan, 9 Iowa. 185; Mosher, 32 Me. 412; Blanchard, 48 Me. 174; French v. Lord, 69 Me. 537; Chew, 1 Md. 163, 172; Potter v. Wheeler, 1 Mass. 54; Hill v. Gregory, 56 Miss. 341; Lloyd v. Conover, 1 Dutch. 47; Wilkinson v. Parish, 3 Paige, 653; Smith, 6 Iowa. 403; Woodhull v. Longstreet, 3 Harris, 405; Hudson v. Steere, 9 R. I. 106; *post*, § 254.

29 Chew, 1 Md. 163, 172; cases *supra*, n. 28.

30 1 Scribner Dow. 337. As when statute takes away right of survivorship: Davis v. Logan, 9 Iowa. 185; Holbrook v. Finney, 4 Mass. 386; 3 Am. Dec. 243; James v. Raran, 6 Smedes & M. 393; Weir v. Tate, 4 Ired. Eq. 264; Reed v. Kennedy, 2 Stroob. 67.

31 Not by husband's assignment: Cockerill v. Armstrong, 31 Ark. 589, 594; Maybury v. Brien, 15 Peters, 21, 67.

32 1 Scribner Dow. 222; Park Dow. 56; Jackson v. Jacob, 11 Bush. 648; Kennedy, 5 Dutch. 185; Leech, 21 Hun, 282; Beardslee, 5 Barb. 52; House v. Jackson, 50 N. Y. 184; Vanleer, 3 Tenn. Ch. 23; *post*, § 254.

33 Houston v. Smith, 88 N. C. 312, 313. See Bates, 1 Raym. Ld. 326; Northcutt v. Whipp, 15 Mon. B. 65; Eldredge v. Forrestal, 7 Mass. 258; Fisk v. Eastman, 5 N. H. 240; Dunham v. Osborn, 1 Paige, 634; *infra*, n. 34.

34 Houston v. Smith, 88 N. C. 312, 313. S. P., Robinson v. Codman, 1 Sum. 130; Butler v. Cheatham, 8 Bush. 534; Dunham v. Angier, 29 Me. 242; Spangler v. Stanler, 1 Md. Ch. 36; Brooks v. Everett, 13 Allen, 447; Wilmarth v. Bridges, 113 Mass. 497; Gibbons v. Brittemum, 56 Miss. 222; Otis v. Parshey, 10 N. H. 403; Fisk v. Eastman, 5 N. H. 240; Green v. Putnam, 1 Barb. 500; House v. Jackson, 50 N. Y. 184; Dunham v. Osborn, 1 Paige, 634; Weir v. Humphries, 4 Ired. Eq. 275; Royster, Phil. Eq. 238; Watkins v. Thornton, 11 Ohio St. 267; Gardner v. Greene, 5 R. I. 184; Apple, 1 Head, 348; Vanleer, 3 Tenn. Ch. 23; Bow v. Maynard, 2 Leigh. 30; *post*, § 254. Except by statute: Coker, 89 Pa. St. 235; *ante*, § 247.

35 Kade v. Lauber, 16 Abb. Pr. N. S. 287; 48 How. Pr. 382; *ante*, § 249.

36 Norwood v. Morrow, 4 Dev. & B. 447, 448; Chester v. Greer, 5 Hump. 29, 30; *ante*, § 249.

37 Price v. Hobbs, 47 Md. 353, 373.

38 Stewart, 3 Marsh. J. J. 48, 49. If marriage and assignment took place the same day, court presumes, in absence of proof, that marriage took place first: Stewart, 3 Marsh. J. J. 48, 49.

39 Gilly v. Ray, 18 Mon. B. 107, 113; Rawlings v. Adams, 7 Md. 27, 34.

40 Kade v. Lauber, 16 App. Pr. N. S. 287; 48 How. Pr. 382.

§ 253. The kinds of property subject to dower. — Dower attaches to all hereditaments, corporeal or incorporeal, which savor of the realty.<sup>1</sup> Thus, dower may be allowed in lands and tenements;<sup>2</sup> in a manor;<sup>3</sup> in an advowson,



in gross or appendant; <sup>4</sup> in tithes, pensions, and ecclesiastical benefits from the crown; <sup>5</sup> in a rent service, rent charge, or rent seck; <sup>6</sup> in a common certain, gross or appendant; <sup>7</sup> (but it seems, in things appendant, only if endowed of the thing to which they are appendant; <sup>8</sup>) in franchises, parcel of an honor; <sup>9</sup> in a piscary, <sup>10</sup> offices, <sup>11</sup> a fair, <sup>12</sup> a market, <sup>13</sup> a dove house, <sup>14</sup> a mill, <sup>15</sup> a ferry, <sup>16</sup> courts, fines, and heriots, <sup>17</sup> and estovers. <sup>18</sup> So dower attaches to such mines as are opened by the husband, <sup>19</sup> or by his heirs before the assignment, <sup>20</sup> and this, not only to the extent they have been opened, but to their full extent; <sup>21</sup> whether, too, they have been abandoned or closed, or not; <sup>22</sup> but she cannot open mines, <sup>23</sup> this would be waste. <sup>24</sup> So, she has dower of such turpentine trees as her husband has boxed and of enough others to keep up the same number. <sup>25</sup> In some States statutes deny dower in wild lands; <sup>26</sup> and it has been held that even at common law there would have been no dower in such lands, <sup>27</sup> because it would be waste to cut the trees, <sup>28</sup> and there would be no rents and profits otherwise; <sup>29</sup> but in many cases it has been held not waste to clear wild lands, and dower has accordingly been allowed in them. <sup>30</sup> But lands connected with a dwelling, <sup>31</sup> or used for pasture, <sup>32</sup> or cultivated at all, <sup>33</sup> are not wild lands. Dower attaches to land covered with water, as there can be no waste of such lands. <sup>34</sup> But there is no dower in the use of surplus water of a river for hydraulic purposes. <sup>35</sup> Shares in corporations are generally deemed personalty, <sup>36</sup> and no dower is allowed therein; <sup>37</sup> but in some cases, whether on the ground that the corporate lands were vested in the individual shareholders and the corporation merely managed them, or on other grounds, dower has been allowed in them as in realty. <sup>38</sup> So there is no dower in annuities, unless they are charged on land. <sup>39</sup>

Formerly there was dower in slaves, by statute.<sup>40</sup> There is no dower in grass, fruits, and spontaneous productions of the soil growing at time of husband's death.<sup>41</sup> In the next section will be discussed what estate the husband must have in these various kinds of property in order that the wife may have dower therein.

1 Buckenridge v. Ingram, 2 Ves. Jr. 652, 664; Conner v. Shepherd, 15 Mass. 164, 167; 1 Scribner Dow. pp. 198, *et seq.*; Park Dow. 110-112; *ante*, ‡ 244, n. 3. See Hudson v. Steere, 9 R. I. 106; Leach, 21 Hun, 331; Gorham v. Daniels, 23 Vt. 611.

2 Stoughton v. Leigh, 1 Taunt. 409; Litt. ‡ 36.

3 Bragg, Godb. 135; Goulds. 37.

4 Howard v. Cavendish, Cro. Jac. 621; Co. Litt. 32 a.

5 Thynn, Style, 99; Co. Litt. 159 a, 32 a. See Ebey, 1 Wash. 216.

6 Perkins, §§ 345, 347. See Stoughton v. Leigh, 1 Taunt. 402; Herbert v. Wren, 7 Cranch, 370; Boyd v. Hunter, 44 Ala. 705; Chase, 1 Bland, 206, 225, 226; 1 Scribner Dow. pp. 373 *et seq.*

7 Perkins, ‡ 342; Fitzh. N. B. 148.

8 Park Dow. 114, 115.

9 Howard v. Cavendish, Cro. Jac. 622.

10 Bracton, 98, 208; Co. Litt. 32 a.

11 Style Pr. Reg. 122; Fitzh. N. B. 18, 149.

12 Co. Litt. 32 a; Fitzh. N. B. 8 (K) n.

13 Gilbert Uses, 371. Compare Gwynne v. Cincinnati, 3 Ohio, 24.

14 Co. Litt. 32 a.

15 Perkins, ‡ 342; Gilbert Uses, 371. Compare Beavers v. Smith, 11 Ala. 20.

16 Stevens, 3 Dana, 371, 373.

17 Co. Litt. 32 a.

18 Perkins, §§ 341, 343.

19 Hoby, 1 Vern. 218; Stoughton v. Leigh, 1 Taunt. 402; Quarington v. Arthur, 10 Mees. & W. 335; King v. Dunsford, 2 Ad. & E. 568, 593.

20 Lenfers v. Heake, 73 Ill. 405; 24 Am. Rep. 263.

21 Moore v. Rollins, 45 Me. 493, 494; Billings v. Taylor, 10 Pick. 460; 20 Am. Dec. 533; Findlay v. Smith, 6 Munf. 134; 8 Am. Dec. 733; Crouch v. Puryear, 1 Rand. 253; 10 Am. Dec. 528.

22 Coates v. Cheever, 1 Cowen, 460.

23 1 Scribner Dow. 205; Park Dow. 117-120.

24 King v. Dunsford, 2 Ad. & E. 568, 573; *post*, ‡ 264.

25 Carr, 4 Dev. & B. 179.

26 Me. R. S. 1871, ‡ 2; Mass. P. S. 1882, p. 741, ‡ 4; *ante*, ‡ 247.

27 Conner v. Shepherd, 15 Mass. 164, 167; Webb v. Townsend, 1 Pick. 21; 11 Am. Dec. 132.

- 23 *Allen v. McCoy*, 8 Ohio, 418, 431; *post*, § 264.
- 29 *Conner v. Shepherd*, 15 Mass. 164, 167.
- 30 *Allen v. McCoy*, 8 Ohio, 418, 464. See 1 Scribner Dow. 214; *Pike v. Underhill*, 24 Ark. 124; *Chapman v. Shroeder*, 10 Ga. 321; *Schaebly*, 26 Ill. 116; *Hickman v. Irvine*, 3 Dana, 121; *Campbell*, 2 Doug. 141; *Brown v. Richards*, 17 N. J. Eq. 32; *Jackson v. Sellick*, 8 Johns. 262; *Jackson v. Brownson*, 7 Johns. 227; 5 Am. Dec. 253; *Walker v. Snuyler*, 10 Wend. 480; *Joyner v. Speed*, 68 N. C. 236; *Hastings v. Crunckleton*, 3 Yeates, 261; *Wilson v. Smith*, 5 Yerg. 579; *Owen v. Hyde*, 6 Yerg. 334; 28 Am. Dec. 467; *Findlay v. Smith*, 6 Munf. 134; 8 Am. Dec. 733.
- 31 *Shattuck v. Grey*, 23 Pick. 88, 92; *White v. Willis*, 7 Pick. 193.
- 32 *Demham v. Angier*, 20 Me. 242, 246; *Mosher*, 15 Me. 371.
- 33 *Stevens v. Perley*, 24 Me. 94; *Johnson v. Perley*, 2 N. H. 56; 9 Am. Dec. 35.
- 34 *Brackett v. Unknown*, 53 Me. 238, 246.
- 35 *Kingman v. Sparrow*, 12 Barb. 201, 209.
- 36 *Boone Corporations*, § 105; 1 Scribner Dow. 214.
- 37 *Weekly*, 2 Younge, & C. 281; *Johns*, 1 Ohio St. 350, 351. S. P., *Bradley v. Holsworth*, 3 Mees. & W. 422; *Knight v. Barber*, 16 Mees. & W. 66; *Watson v. Spratley*, 23 Eng. & L. Eq. 507; *Planters' v. Merchants'*, 4 Ala. 753; *McDougal v. Hepburn*, 5 Fla. 563; *Russell v. Temple*, 3 Dane Abr. 108, §§ 2-6; *Tippets v. Walker*, 4 Mass. 596; *Howe v. Starkweather*, 17 Mass. 243; *Fisdale v. Harris*, 20 Pick. 9; *Hutchins v. State*, 12 Met. 421; *Denton v. Livingston*, 9 Johns. 96; 6 Am. Dec. 261; *Heart v. State*, 2 Dev. Ch. 111; *Staymaker v. Gettysburg*, 10 Pa. St. 373; *Gilpin v. Howell*, 5 Pa. St. 57; 14 Am. Dec. 720; *Arnold v. Ruggles*, 1 K. I. 165; *Brightwell v. Mallory*, 10 Yerg. 196.
- 38 *Drybutter v. Bartholemew*, 2 P. Wms. 127; *Townsend v. Ash*, 3 Atk. 336, 337, 338; *Bligh v. Brent*, 2 Younge & C. 268 294, 295; *Welles v. Cowles*, 2 Conn. 567; 4 Conn. 182; 10 Am. Dec. 115; *Copeland*, 7 Bush, 349, 351; *Price*, 6 Dana, 107; 34 Am. Dec. 608; *Binney*, 2 Bland, 39, 145, 146; *Cape Sable*, 3 Bland, 656, 670; *Hurst v. Meeson*, 4 Watts, 346.
- 39 *Robinson v. Townshend*, 3 Glll & J. 413.
- 40 1 Scribner Dow. pp. 224-226.
- 41 *Ralston*, 3 Iowa, 533; *Kain v. Fisher*, 6 N. Y. 597.

§ 254. **Kinds of estates subject to dower.**—Absolute fee-simple estates are subject to dower.<sup>1</sup> So are estates tail, except in the case of a fee-tail special if the wife's issue is excluded;<sup>2</sup> but fee-tail estates are generally abolished in the United States and the first donee is given either a life estate or an estate in fee simple;<sup>3</sup> in the latter case his wife has dower,<sup>4</sup> but not in the former.<sup>5</sup> A condition annexed to an estate in fee, that it shall not be subject to dower, is repugnant and void at common law,<sup>6</sup> but this has been changed by statute

in England.<sup>7</sup> If one estate in fee is exchanged for another estate in fee, the widow must, both at common law<sup>8</sup> and by statute,<sup>9</sup> elect to take dower in either the original or the exchanged estate, she cannot have dower in both; but there must have been a technical exchange: the estates must have been of the same quantity,<sup>10</sup> and the deed must have been one of exchange;<sup>11</sup> for, where A and B exchanged lands by two ordinary deeds, A's widow was allowed dower in both properties,<sup>12</sup> but the properties need not have been of the same value.<sup>13</sup> Determinable fees are generally subject to dower,<sup>14</sup> except that if the estate determines before the husband's death dower does not become consummate at all.<sup>15</sup> More particularly, if the estate determines by natural limitation, the wife has dower as if it had not determined at all,<sup>16</sup> as where the estate escheats to the State for want of heirs, the wife continues the husband's holding and has her dower.<sup>17</sup> If it is determined by the entry of one who has a superior title, dower determines too.<sup>18</sup> When a base or qualified fee ceases, so does dower.<sup>19</sup> If the estate is determinable under a power of appointment, dower ceases if the power is exercised, otherwise not.<sup>20</sup> (Of course there is no dower at all in a mere life estate, though the power of appointing the fee be annexed.<sup>21</sup>) If the estate be conditional, and be determined by entry for forfeiture, dower is destroyed.<sup>22</sup> If the estate is determinable under collateral limitations, dower is determined when the event happens.<sup>23</sup> Whether an estate determinable under a conditional limitation or by an executory devise, continues subject to dower after it has determined, is disputed, though the weight of opinion seems to be that it does.<sup>24</sup> Estates in remainder or reversion expectant on a freehold are not subject to dower,<sup>25</sup> except by statute,<sup>26</sup> but if expectant on a leasehold, they are;<sup>27</sup> if,

however, the precedent estate determines during coverture while the husband has the inheritance, inchoate dower at once arises;<sup>28</sup> if the intervening estate is merely a contingent remainder, dower attaches but is defeated if the remainder vests.<sup>29</sup> Hence there can be no dower in lands assigned for dower.<sup>30</sup> Estates in common<sup>31</sup> and in coparcenary<sup>32</sup> are subject to dower, but joint estates are not.<sup>33</sup> There is no dower in trust estates,<sup>34</sup> or in equitable estates at common law,<sup>35</sup> or in partnership estates,<sup>36</sup> or in life estates, whether for the life of the tenant<sup>37</sup> or *pur autre vie*,<sup>38</sup> or in estates at will,<sup>39</sup> or in estates for years,<sup>40</sup> except by statute,<sup>41</sup> or an estate of pre-emption.<sup>42</sup>

1 Conner v. Shepherd, 15 Mass. 164, 167; Stevens v. Owen, 25 Me. 94; 1 Scribner Dow. 281.

2 Chew, 1 Md. 163, 172; Spangler v. Stanler, 1 Md. Ch. 36, 33; Smith, 23 Pa. St. 9; *ante*, § 246; 1 Scribner Dow. 227, 281.

3 See discussion, 1 Scribner Dow. 281, 282.

4 Chew, 1 Md. 163, 172; Kennedy, 29 N. J. L. 185; *supra*, n. 1.

5 Buriss v. Page, 12 Mo. 353; *infra*, n. 37.

6 Mildmay, 6 Coke, 41 a.; Co. Litt. 424 a.

7 3 and 4 Wm. IV. ch. 105, § C.

8 Butler, 3 Leon, 271; Park Dow. 261; Perkins, § 319; Co. Litt. 31 b.

9 Ark. Dig. 1874, §§ 2112-2114; Ill. R. S. 1830, p. 427, § 17; Mich. R. S. 1832, § 734; N. Y. R. S. 1882, p. 2197, § 3; Stevens v. Smith, 4 Marsh. J. J. 64; 20 Am. Dec. 205; Mahoney v. Young, 3 Dana, 588; 28 Am. Dec. 114.

10 Wilcox v. Randall, 7 Barb. 633; 1 Scribner Dow. 284.

11 Cass v. Thompson, 1 N. H. 65, 67; 8 Am. Dec. 36.

12 Cass v. Thompson, 1 N. H. 65, 67; 8 Am. Dec. 36.

13 1 Scribner Dow. 284.

14 Wash. Real. Prop. 131, 208; *infra*, notes 16, *et seq.*

15 1 Scribner Dow. 320.

16 Park Dow. 157; 1 Scribner Dow. 286; Northcutt v. Whipp, 12 Mon. B. 73; Lawrence v. Brown, 5 N. Y. 394; Fowler v. Griffin, 3 Sand. 385.

17 Park Dow. 158; 1 Scribner Dow. 287.

18 Countess v. Vanlore, Winch, 77; 1 Scribner Dow. 200.

19 Machell v. Clark, 2 Raym. 778; 2 Salk. 619; Whiting, 4 Conn. 179; Jackson v. Kip, 8 N. J. L. 241.

20 Ray v. Pung, 5 Barn. & Ald. 561; 7 Eng. C. L. 193; Chinnubbee v. Nicks, 3 Port. 362; Thompson v. Vance, 1 Met. (Ky.) 670; 7 Am. Law Reg. 222; Link v. Edmondson, 19 Mo. 487; Hawley v. James, 5 Pufige, 223, 455; Peay, 3 Rich. Eq. 400.

21 Thompson v. Vance, Met. (Ky.) 670 ; 7 Am. Law Reg. 222 ; Collins v. Carlisle, 7 Mon. B. 14 ; McGaughey v. Henry, 15 Mon. B. 383.

22 Moore v. Esty, 5 N. H. 479 ; Beardslee, 5 Barb. 324 ; 1 Scribner Dow. 291 ; Park Dow. 154.

23 1 Scribner Dow. 237 ; Park Dow. 165-167.

24 See discussion, 1 Scribner Dow. 298, *et seq.*

25 Moody v. King, 2 Bing. 447 ; 9 Eng. C. L. 475 ; Barker, 2 Sim. 249 ; Buckworth v. Thirkell, 1 Coll. Juris. 332 ; 3 Bos. & P. 652, n ; Edwards v. Bibb, 54 Ala. 475 ; Northcutt v. Whipp, 12 Mon. B. 65 ; Hilleary, 26 Md. 274, 287 ; Adams v. Beekman, 1 Paige, 631 ; Weller, 23 Barb. 588 ; Evans, 9 Pa. St. 190 ; Lovett, 10 Phila. 537 ; Milledge v. Lamar, 4 Desaus. 617, 637, 645 ; Jones v. Hughes, 27 Gratt. 560 ; Medley, 27 Gratt. 568 ; Houston v. Smith, 88 N. C. 312, 313 ; *ante*, ‡ 252.

26 Cote, 89 Pa. St. 235.

27 Bates, 1 Raym. Ld. 326 ; Boyd v. Hunter, 44 Ala. 705 ; 1 Greenl. Cruise, 162.

28 Co. Litt. 29 a. ; 1 Scribner Dow. 234.

29 1 Scribner Dow. 246.

30 Durando, 23 N. Y. 331 ; 32 Barb. 529 ; 9 Am. Law Reg. 630 ; *post*, ‡ 255.

31 Chew, 1 Md. 163, 172 ; *ante*, ‡ 252.

32 Lee v. Lindell, 27 Mo. 202, 206 ; *ante*, ‡ 252.

33 Maybury v. Brien, 15 Peters, 21, 37 ; *ante*, 252.

34 Cowman v. Hill, 3 Gill & J. 398, 405. S. P., Powell v. Monson, 3 Mason, 364 ; Bailey v. West, 41 Ill. 290 ; Dean v. Mitchell, 4 Marsh. J. J. 451 ; White v. Drew, 42 Mo. 561 ; *ante*, ‡ 252.

35 Gully v. Ray, 18 Mon. B. 107, 113 ; *post*, ‡ 256.

36 Nicoll v. Ogden, 29 Ill. 323 ; *post*, ‡ 257.

37 Exton v. St. John, Finch, 368 ; Bowles v. Poore, 1 Bulst. 135 ; Low v. Burron, 3 P. Wms. 262 ; People v. Gillis, 24 Wend. 201 ; Litt. ‡ 56 ; Park Dow. 48, 58 ; 1 Scribner Dow. 359.

38 Low v. Burron, 3 P. Wms. 262 ; Edwards v. Bibb, 54 Ala. 475 ; Thompson v. Vance, 1 Met. (Ky.) 669 ; Fisher v. Grimes, 1 Smedes & M. 107 ; Burris v. Page, 17 Mo. 358 ; Gillis v. Brown, 5 Cowen, 388 ; Knickerbacker v. Seymour, 46 Barb. 198 ; Alexander v. Cunningham, 5 Ired. 430.

39 4 Coke, 22 a, 22 b ; 1 Scribner Dow. 369 ; 1 Wash. Real Prop. 191.

40 Spangler v. Stanler, 1 Md. Ch. 36, 37. S. P., Goodwin, 33 Conn. 314 ; Ware v. Washington, 6 Smedes & M. 737 ; Joellekner v. Hudson, 1 Sand. 215 ; Reynolds v. Com. Stark Co. 5 Ohio, 204 ; North v. Rossa, 13 Ohio, 234, 363 ; Murdock v. Ratcliff, 7 Ohio, 119.

41 Mass. P. S. 1882, p. 735, ‡ 2 ; Abbott v. Bosworth, 36 Ohio St. 605.

42 Drennan v. Walker, 21 Ark. 539 ; Wooley v. Magie, 26 Ill. 526 ; Davenport v. Fauer, 2 Ill. 314 ; Longworthy v. Heeb, 46 Iowa, 64 ; Bowers v. Keesecker, 14 Iowa, 301 ; Wells v. Moore, 16 Mo. 478.

‡ 255. *Dos de dote peti non debet.*—As dower when assigned is a life estate,<sup>1</sup> the inheritance in lands assigned for dower is subject to a freehold, and therefore

another dower cannot be assigned therein;<sup>2</sup> hence the rule—*Dos de dote peti non debet*.<sup>3</sup> This is strictly true when the lands have come by devise<sup>4</sup> or descent,<sup>5</sup> for in such case the ancestor died seized, and the widow's seisin is but a continuation of his,<sup>6</sup> the assignment dating back to the time of his death;<sup>7</sup> but when the land has been aliened by the husband during his life, his alienee becomes seized, and if such alienee marries before the alienor's widow has her dower assigned,<sup>8</sup> the requisites concur,<sup>9</sup> and his wife's inchoate dower attaches, and when he dies she has dower out of dower.<sup>10</sup> So if the widow of the heir has her dower assigned before the widow of the ancestor has her dower assigned, though the former dower ceases when the latter is assigned, it revives again when the latter ceases.<sup>11</sup> So in any case, if the widow dies before the heir, devisee, or purchaser dies or aliens the inheritance, the widow of such heir, devisee, or purchaser, will of course have her dower.<sup>12</sup> The same thing happens if the widow, instead of dying, waives, forfeits, or otherwise determines her dower.<sup>13</sup> If the assignment of the first dower has not been by metes and bounds, an analogous result is sought to be obtained by calculation.<sup>14</sup>

1 Moore v. Mayor, 8 N. Y. 110, 113; 59 Am. Dec. 473; *post*, § 264.

2 Windham v. Portland, 4 Mass. 384, 388.

3 Glanv. Lib. 6, ch. 16; Perkins, § 315; Park Dow. 154-156; 1 Scribner Dow. 324; D'Arcy v. Blake, 2 Schoales & L. 387.

4 See Steel v. La Framboise, 68 Ill. 456; McLeery, 65 Me. 172; 20 Am. Rep. 683; Durando, 23 N. Y. 331; 9 Am. Law Reg. 630; Reitzel v. Eckard, 65 N. C. 673; Peckham v. Howden, 8 R. I. 160; Apple, 1 Head, 348.

5 See Hitchens, 2 Vern. 403; Robinson v. Miller, 2 Mon. B. 284, 288; Beekman v. Hudson, 20 Wend. 53.

6 Moore v. Mayor, 8 N. Y. 110, 113; 59 Am. Dec. 473; *post*, § 264.

7 See Robinson v. Miller, 2 Mon. B. 284, 288; Geer v. Hamblin, 1 Me. 54, 56; 1 Scribner Dow. 331-333; Park Dow. 156.

8 See Cregier, 1 Barb. Ch. 598, 602.

9 *Ante*, § 249.

10 Bustard, 4 Coke, 122 a; Geer v. Hamblin, 1 Me. 54, 56; Manning v. Laboree, 33 Me. 343; Durando, 23 N. Y. 331; Cregier, 1 Barb. Ch.

598, 602; *Dunham v. Osborn*, 1 Paige, 634; *Reitzel v. Eckard*, 65 N. C. 673.

11 *Cregier*, 1 Barb. Ch. 598, 602; 1 Scribner Dow. 327.

12 *Bear v. Snyder*, 11 Wend. 592; 1 Scribner Dow. 326.

13 *Geer v. Hamblin*, 1 Me. 54, 56; *Elwood v. Klock*, 13 Barb. 50. But see *Leavitt v. Lamphrey*, 13 Pick. 382; 23 Am. Dec. 685.

14 See *Fisher v. Grimes*, 1 Smedes & M. 107; *Dunham v. Osborn*, 1 Paige, 634, 636; 1 Scribner Dow. 329.

2 256. **Dower in equitable estates.**—At common law dower attached only to legal estates<sup>1</sup>—all kinds of uses and trusts were exempt;<sup>2</sup> for instance, trusts created by deed or will,<sup>3</sup> an equity of redemption,<sup>4</sup> or property which has been paid for but of which the deed has not been given.<sup>5</sup> The common-law rule still exists in Connecticut,<sup>6</sup> Delaware,<sup>7</sup> Florida,<sup>8</sup> Georgia,<sup>9</sup> Maine,<sup>10</sup> Massachusetts,<sup>11</sup> Michigan,<sup>12</sup> New Hampshire,<sup>13</sup> Oregon,<sup>14</sup> South Carolina,<sup>15</sup> Vermont,<sup>16</sup> and Wisconsin;<sup>17</sup> except that in Massachusetts dower exists in an equity of redemption by statute,<sup>18</sup> and in property in which the husband has a perfect and complete equitable title by construction.<sup>19</sup> On the other hand, the common-law rule has never been followed in Louisiana.<sup>20</sup> It has been abolished by statute impliedly in Arkansas,<sup>21</sup> and expressly in England,<sup>22</sup> Alabama,<sup>23</sup> Illinois,<sup>24</sup> Kentucky,<sup>25</sup> Maryland,<sup>26</sup> Missouri,<sup>27</sup> New Jersey,<sup>28</sup> New York,<sup>29</sup> North Carolina,<sup>30</sup> Ohio,<sup>31</sup> Rhode Island,<sup>32</sup> Tennessee,<sup>33</sup> Virginia,<sup>34</sup> and West Virginia.<sup>35</sup> The object of these statutes is to remedy the common law, and they therefore apply to all equitable estates,<sup>36</sup> even to those owned by the husband before the passage of the act, if the right of no third party has intervened.<sup>37</sup> But equitable *estates* must be distinguished from equitable *rights*; <sup>38</sup> in a mere right there is no dower.<sup>39</sup> It is therefore generally said that in order to entitle the wife to dower the husband's equity must be perfect and complete<sup>40</sup>—it must be an



interest which would pass to his heirs, not a mere right of action which would pass to his personal representative.<sup>41</sup> Thus, there is dower in land which the husband has bought and for which he has paid, but the deed of which he has lost before recording it;<sup>42</sup> so there is dower in an equity of redemption,<sup>43</sup> whether the mortgage was made before or after marriage,<sup>44</sup> and with or without the wife's consent;<sup>45</sup> but if made before marriage or with her consent, she must after his death contribute ratably towards redemption,<sup>46</sup> and if the property is sold, is dowerable only out of the surplus.<sup>47</sup> It must be such an equitable estate that equity would decree the legal title;<sup>48</sup> there is no dower when the trust,<sup>49</sup> or contract,<sup>50</sup> being by parol, is not enforceable in equity. In the case of a contract of purchase, when the husband has paid all the purchase money,<sup>51</sup> and is entitled to the specific performance of the agreement to give a deed for the land,<sup>52</sup> the wife has dower; and when he has paid none of the purchase money, she has no dower;<sup>53</sup> but whether she has dower when he has paid a portion of the purchase money is disputed, some courts holding that all the purchase money must be paid,<sup>54</sup> others denying this.<sup>55</sup> The true rule seems to be, that when the husband's contract gives him the right to the property only after payment of all the purchase money, there is no dower unless it has all been paid;<sup>56</sup> but when he has received possession of the property,<sup>57</sup> and the vendor has retained the title only as security, or has relied on his lien for the purchase money, the wife has dower,<sup>58</sup> subject to the vendor's rights;<sup>59</sup> and after her husband's death has a right to call on his personal representatives to pay the balance, she contributing her share,<sup>60</sup> or if the property is sold to pay such balance, she is to be endowed out of the surplus.<sup>61</sup> But there is no dower in any equitable es-

tate of which the husband is not seized at the time of his death,<sup>62</sup> for if he has aliened it absolutely,<sup>63</sup> or by way of mortgage,<sup>64</sup> or has subjected it to any other lien,<sup>65</sup> the wife's dower is defeated absolutely or *pro tanto*.<sup>66</sup> Still, a mere agreement to convey will not defeat dower, except to the extent of the purchase money paid thereupon;<sup>67</sup> and if the husband has, by means of his wife's joinder, put a mortgage on all of a piece of property, he cannot without her joinder dispose of the equity of redemption so as to defeat dower therein;<sup>68</sup> so the husband may rescind a contract of purchase before it has been fully executed, without subjecting the property to dower.<sup>69</sup> If after the husband has aliened the equitable title he receives the legal title, he holds such title in trust for his assignee, and there is no dower in it.<sup>70</sup>

1 Chaplin, 3 P. Wms. 229, 234; D'Arcy v. Blake, 2 Schoales & L. 387, 388, 389; Smith v. Adams, 5 DeGex, M. & G. 712; Powdrell v. Jones, 2 Smith & Gif. 407; Ransom, 17 Fed. Rep. 331, 333; Stelle v. Carroll, 12 Peters, 201; Blakeney v. Ferguson, 20 Ark. 547; Gully v. Ray, 18 Mon. B. 107, 113; Mann v. Edson, 39 Me. 25; cases cited *infra*, notes 2-17.

2 1 Scribner Dow. 413. Not in money to be laid out in land: Crabtree v. Bramble, 3 Atk. 680, 687; *ante*, § 136.

3 Chaplin, 3 P. Wms. 229, 234.

4 Dixon v. Saville, 1 Bro. C. C. 326, 327; Maybury v. Brien, 15 Peters, 21, 38.

5 Williams v. Barrett, 2 Cranch C. C. 673.

6 Conn. R. S. 1875, p. 376; Deforest, 1 Root, 50; Calder v. Bull, 2 Root, 50; Stewart, 5 Conn. 317; Steadman v. Fortune, 5 Conn. 462.

7 Del. R. L. 1874, p. 533; Conroy, 3 Del. Ch. 407.

8 Fla. Dig. 1881, p. 475.

9 Ga. Code 1873, p. 304; Chapman v. Shroeder, 10 Ga. 321; Green v. Causey, 10 Ga. 435; Bowen v. Collins, 15 Ga. 100; Hart v. McCollum, 28 Ga. 478; Aaron v. Boyne, 28 Ga. 107; Day v. Solomon, 40 Ga. 32.

10 Me. R. S. 1871, p. 756; Hamlin, 19 Me. 141; Mann v. Edson, 39 Me. 25; Freeman, 39 Me. 426; Thorndike v. Spear, 31 Me. 91; Kidder v. Blaisdell, 45 Me. 461.

11 Mass. P. S. 1882, p. 740, § 3; Reed v. Whitney, 7 Gray, 533, 538.

12 Mich. R. S. 1882, §§ 57, 33; Campbell v. Clark, 2 Doug. 141; May v. Sprecht, 1 Mann. 187.

13 N. H. R. S. 1878, p. 474; Hobbins v. Dumas, 42 N. H. 296.

14 Oreg. Dig. 1874, p. 534; Farnum v. Loomis, 2 Oreg. 29.

15 S. C. R. S. 1882, § 1801; *Secrest v. McKenna*, 6 Rich. Eq. 72; *Spreight v. Meigs*, 1 Brev. 486; *Peay*, 2 Rich. Eq. 403.

16 Vt. R. S. 1880, p. 449; *Jenny*, 24 Vt. 324; *Thayer*, 14 Vt. 107; 39 Am. Dec. 211; *Ladd*, 14 Vt. 185; *Gorham v. Daniels*, 23 Vt. 600.

17 Wis. R. S. 1873, p. 626.

18 *Reed v. Whitney*, 7 Gray, 533, 537. See Mich. R. S. 1882, § 5735.

19 *Reed v. Whitney*, 7 Gray, 533, 538; *Hall v. Munn*, 4 Gray, 132.

20 *Shoemaker v. Walker*, 2 Serg. & R. 554; *Reed v. Morrison*, 12 Serg. & R. 18; *Kelly v. Mehan*, 2 Yeates, 515; *Jones v. Patterson*, 12 Pa. St. 149, 154; *Pritts v. Richey*, 29 Pa. St. 71, 76; *Dubs*, 31 Pa. St. 149; *Junk v. Canon*, 34 Pa. St. 286.

21 *Kirby v. Vantreece*, 26 Ark. 363, 370.

22 3 William IV. ch. 105, § 2.

23 Ala. Code, 1876, § 2232; *Gillespie v. Somerville*, 3 Stewt. & P. 347; *Allen*, 4 Ala. 556; *Edmondson v. Montague*, 14 Ala. 370; *Crabb v. Pratt*, 15 Ala. 843; *Parks v. Brooks*, 16 Ala. 529; *Harrison v. Boyd*, 36 Ala. 503.

24 Ill. R. S. 1880, p. 425; *Davenport v. Farrar*, 1 Scam. 314; *Sisk v. Smith*, 1 Gilm. 503; *Owen v. Robbins*, 19 Ill. 549; *Atkin v. Merrill*, 39 Ill. 62; *Stow v. Steel*, 45 Ill. 328; *Greenbaum v. Austrian*, 70 Ill. 591.

25 Ky. R. S. 1881, p. 527, § 2; *Pugh v. Bell*, 2 Mon. 126; *Stevens v. Smith*, 4 Marsh. J. J. 64; 20 Am. Dec. 205; *Dean v. Mitchell*, 4 Marsh. J. J. 451; *Hamilton v. Hughes*, 6 Marsh. J. J. 581; *Lindsey v. Stevens*, 5 Dana, 104; *Lawson v. Morton*, 6 Dana, 471; *Brewer v. Van Arsdale*, 6 Dana, 204; *Robinson v. Miller*, 1 Mon. B. 88, 91; *Ifeed v. Ford*, 16 Mon. B. 114; *Gully v. Ray*, 18 Mon. B. 107.

26 Md. R. S. 1873, p. 397; *Hopkins v. Frey*, 2 Gill, 359; *Miller v. Stump*, 3 Gill, 304, 311; *Spangler v. Stanler*, 1 Md. Ch. 36; *Bowie v. Berry*, 1 Md. Ch. 452; 3 Md. Ch. 359; *Purdy*, 3 Md. Ch. 547; *Steuart v. Beard*, 4 Md. Ch. 319; *Lynn v. Gephart*, 27 Md. 547; *Glenn v. Clark*, 53 Md. 580, 604.

27 Mo. R. S. 1879, p. 363; *Duke v. Brandt*, 51 Mo. 221, 225; *Hart v. Logan*, 49 Mo. 47.

28 N. J. Rev. 1877, p. 320; *Yeo v. Mercereau*, 18 N. J. L. 387, 330; *Boyd v. Thompson*, 21 N. J. L. 58, 61; 22 N. J. L. 543, 548.

29 N. Y. R. S. 1882, p. 2196; *Hicks v. Stebbins*, 3 Lans. 39; *Johnson v. Thomas*, 2 Paige, 377; *Hawley v. James*, 5 Paige, 318; *Church*, 3 Sand. Ch. 434; *Coster v. Clarke*, 3 Edw. Ch. 423; *McCartee v. Teller*, 2 Paige, 511.

30 N. C. R. S. 1873, p. 839; *Klutts*, 5 Jones Eq. 80; *Thompson*, 1 Jones, 430.

31 Ohio R. S. 1880, p. 1043; *Abbott v. Bosworth*, 36 Ohio St. 605; *Miller v. Wilson*, 15 Ohio, 105; *Rands v. Kendall*, 15 Ohio, 671; *Smiley v. Wright*, 2 Ohio, 506; *McDonald v. Aten*, 1 Ohio St. 293.

32 R. I. P. S. 1882, p. 637.

33 Tenn. R. S. 1873, § 2398.

34 Va. Code 1873, p. 853; *Routon*, 1 Hen. & M. 92; *Claiborne v. Henderson*, 3 Hen. & M. 322; *Wheatley v. Calhoun*, 12 Leigh, 264; 37 Am. Dec. 654; *Blair v. Thompson*, 11 Gratt. 441.

35 W. Va. R. S. 1879, ch. 82, § 17.

36 *Bailey v. Duncan*, 4 Mon. 256, 265, 266; *Duke v. Brandt*, 51 Mo. 221, 225.

- 37 Hawley v. James, 5 Paige, 318, 453.
- 38 Yeo v. Mercereau, 18 N. J. L. 387, 390; Thompson, 1 Jones, 430, 431, 432.
- 39 Thompson, 1 Jones, 430, 431, 432.
- 40 Pugh v. Bell, 2 Mon. 125, 128. See 1 Scribner Dow. p. 436; Harrison v. Boyd, 36 Ala. 503; Edmondson v. Montague, 14 Ala. 370, 379; Crabb v. Pratt, 15 Ala. 843; Gillespie v. Somerville, 3 Stewt. & P. 447; Rogers v. Rawlings, 8 Port. 325; Nicholl v. Todd, 70 Ill. 295, 297; Taylor v. Kearn, 68 Ill. 339; Stow v. Steel, 45 Ill. 328; Atkin v. Merrill, 39 Ill. 62; Wooley v. Magie, 26 Ill. 526; Owen v. Robbins, 19 Ill. 545; Barnes v. Gay, 7 Iowa, 26; Lindsey v. Stevens, 5 Dana, 104; Brewer v. Van Arsdale, 6 Dana, 204; Yeo v. Mercereau, 18 N. J. L. 387; Pritts v. Richey, 29 Pa. St. 71, 77.
- 41 Nicholl v. Todd, 70 Ill. 295, 297; Duke v. Brandt, 51 Mo. 221, 225.
- 42 Tyson v. Harrington, 6 Ired. Eq. 329.
- 43 McMahon v. Russell, 17 Fla. 698, 705; Cox v. Garst, 105 Ill. 342, 346; Glenn v. Clark, 53 Md. 580, 607; Denton v. Nanny, 8 Barb. 618, 620; Reed v. Morrison, 12 Serg. & R. 18, 20; Eddy v. Boulton, 13 R. I. 105, 106; *post*, § 260.
- 44 Denton v. Nanny, 8 Barb. 618, 620; *post*, § 260.
- 45 Cox v. Garst, 105 Ill. 342, 346; *post*, § 260.
- 46 McMahon v. Russell, 17 Fla. 698, 703; *post*, §§ 258, 260.
- 47 Cox v. Garst, 105 Ill. 342, 346; *post*, §§ 258, 260.
- 48 Taylor v. Kearn, 68 Ill. 339, 341; Rowton, 1 Hen. & M. 92; Claiborne v. Henderson, 3 Hen. & M. 322, 382.
- 49 Ransom, 17 Fed. Rep. 331, 335.
- 50 Herron v. Williamson, Litt. Sel. Cas. 250.
- 51 Edmondson v. Montague, 14 Ala. 370, 379; Pugh v. Bell, 2 Mon. 125, 128; Tyson v. Harrington, 6 Ired. Eq. 329.
- 52 Taylor v. Kearn, 68 Ill. 339, 341; *supra*, n. 48.
- 53 Harrison v. Boyd, 36 Ala. 203, 533; Latham v. McLain, 64 Ga. 320; Smith v. Addleman, 5 Blackf. 406; Barnes v. Gay, 7 Iowa, 26.
- 54 Edmondson v. Montague, 14 Ala. 370, 379; Pugh v. Bell, 2 Mon. 125, 128.
- 55 Brewer v. Van Arsdale, 6 Dana, 204. See Greenbaum v. Austrian, 70 Ill. 591, 594; Malin v. Coult, 4 Ind. 535; Barnes v. Gay, 7 Iowa, 26; Lindsey v. Stevens, 5 Dana, 104; Miller v. Stump, 3 Gill. 304; Lynn v. Gephart, 27 Md. 547; Steuart v. Beard, 4 Md. Ch. 319; Duke v. Brandt, 51 Mo. 221, 228; Hart v. Logan, 49 Mo. 47; Hawley v. James, 5 Paige, 318; Church, 3 Sand. Ch. 434; Thompson, 1 Jones, 430; Klutts, 5 Jones Eq. 80; Smiley v. Wright, 2 Ohio, 567; McDonald v. Aten, 1 Ohio St. 293; Thompson v. Cochran, 7 Humph. 72.
- 56 Consult *supra*, notes 38, 54.
- 57 See Claiborne v. Henderson, 3 Hen. & M. 322, 382; *supra*, n. 55.
- 58 See Duke v. Brandt, 51 Mo. 221, 226; *supra*, n. 55.
- 59 Duke v. Brant, 51 Mo. 221, 226; *post*, § 259.
- 60 Greenbaum v. Austrian, 70 Ill. 591, 594; Lindsey v. Stevens, 5 Dana, 104; Brewer v. Van Arsdale, 6 Dana, 204; Thompson, 1 Jones, 430, 434.
- 61 Bank v. Owens, 31 Md. 320, 326; Thompson v. Cochran, 7 Humph. 72.

62 *Miller v. Stump*, 3 Gill, 304, 311. S. P., Ransom, 17 Fed. Rep. 331, 333, 334; *Owen v. Robbins*, 19 Ill. 545; *Morse v. Thorsell*, 78 Ill. 600, 604; *Butler v. Holtzman*, 55 Ind. 125; *Barnes v. Gay*, 7 Iowa, 26; *Gully v. Ray*, 18 Mon. B. 107, 113; *Heed v. Ford*, 16 Mon. B. 482; *Hamilton v. Hughes*, 6 Marsh. J. J. 581; *Lawson v. Morton*, 6 Dana, 471; *Hamilton v. Hughes*, 6 Marsh. J. J. 581; *Purdy*, 3 Md. Ch. 547; *Bowie v. Berry*, 1 Md. Ch. 482; *Lynn v. Gephart*, 27 Md. 547, 567, 568; *Glenn v. Clark*, 53 Md. 580, 604; *Lobdell v. Hayes*, 4 Allen, 187, 191; *Duke v. Brandt*, 51 Mo. 221, 225; *Hawley v. James*, 5 Paige, 318, 452, 453; *Smiley v. Wright*, 2 Ohio, 506; *Miller v. Wilson*, 15 Ohio, 108; *Rands v. Kendall*, 15 Ohio, 671; *Abbott v. Bosworth*, 36 Ohio St. 605; *Pritts v. Richey*, 29 Pa. St. 71; *Junk v. Canon*, 34 Pa. St. 236. Except by statute: See N. C. R. S. 1873, p. 839, § 1.

63 *Glenn v. Clark*, 53 Md. 580, 604.

64 *Taylor v. Kearn*, 68 Ill. 339, 341; *Miller v. Stump*, 3 Gill, 304, 311.

65 *Post*, § 258.

66 *Lynn v. Gephart*, 27 Md. 547, 568.

67 *Bowie v. Berry*, 3 Md. Ch. 359.

68 *McMahon v. Russell*, 17 Fla. 698, 703; *Bank v. Owings*, 31 Md. 320, 325; *Titus v. Neilson*, 5 Johns. Ch. 452.

69 *Owen v. Robbins*, 19 Ill. 549, 554; *Wheatley v. Calhoun*, 12 Leigh, 264; 37 Am. Dec. 654.

70 *Morse v. Thorsell*, 78 Ill. 600; *Gully v. Ray*, 18 Mon. B. 107; *Heed v. Ford*, 16 Mon. B. 114.

§ 257. *Dower on partnership estates.*—Whether and under what circumstances dower exists in partnership estates has been a vexed question;<sup>1</sup> for, not only is it far from settled whether and when partnership realty is to be considered personalty,<sup>2</sup> but even granting it to be realty, there remain to be settled the priorities as between the widow, the partnership creditors, and the partners themselves.<sup>3</sup> Apart from the widow, the rule seems to be: That real estate purchased with partnership funds or for partnership purposes, is in equity chargeable with the debts of the partnership, and with any balance due one partner on the winding up of the business; and that the surplus, if any, is to be considered and treated as real estate.<sup>4</sup> This surplus alone is liable to the creditors of the individual partners.<sup>5</sup> And the real interest of each partner in the real estate is his share of this surplus<sup>6</sup> on an account taken as of the date of the dissolution of the partnership.<sup>7</sup> The widow holds under her husband,<sup>8</sup> and should have dower only out

of his interest ;<sup>9</sup> so that, although there are cases which hold on the one hand that partnership property is personalty, and there is no dower therein at all,<sup>10</sup> and on the other that realty is realty though owned by partners, and therefore fully subject to dower,<sup>11</sup> the true rule is, that realty bought with partnership funds or for partnership purposes is realty at law subject to dower as if held in common,<sup>12</sup> unless the partners have by express agreement declared it to be personalty ;<sup>13</sup> but that it is subject in equity to a trust<sup>14</sup> in favor of the partnership creditors and of any of the partners with a balance due him,<sup>15</sup> there being no dower in case the property is needed to pay partnership creditors,<sup>16</sup> or a balance due the other partners,<sup>17</sup> but there being dower in the property, if it is not needed for such purpose,<sup>18</sup> or in the surplus if it is only needed in part ;<sup>19</sup> provided, however, that if the property is sold under the partnership lien during coverture dower is defeated,<sup>20</sup> and that the wife does not have to join in a deed thereof for partnership purposes,<sup>21</sup> or have to be made a party when a partnership mortgage thereupon is foreclosed.<sup>22</sup> If there is an express agreement that the realty of the partnership shall be used for paying the debts of the firm, there is no doubt but that the property is subject to the trust above described ;<sup>23</sup> and it is well settled that such an agreement is always implied ;<sup>24</sup> so that the property vests in the partners subject to an equitable lien, which is therefore prior to the dower of their wives.<sup>25</sup> If the lands are sold under the partnership lien, the widow has no dower in rents and profits accruing before the sale.<sup>26</sup> The realty must of course be partnership property, or it will be subject to dower as any other realty ;<sup>27</sup> if bought by the partners it is *prima facie* partnership property ;<sup>28</sup> and it is such property if bought with partnership funds,<sup>29</sup> or for the use of the firm ;<sup>30</sup> but it is not, if

bought for and charged to one partner,<sup>31</sup> or if taken in common by express agreement.<sup>32</sup>

- 1 See 1 Scribner Dow. 563, *et seq.*
- 2 Hale v. Plummer, 6 Ind. 121, 123, 124; Galbraith v. Gedge, 16 Mon. B. 631, 634; Burnside v. Merrick, 4 Met. 537, 541.
- 3 Greene, 1 Ohio, 244, 251; 13 Am. Dec. 642.
- 4 Huston v. Neil, 41 Ind. 504, 509; Buchan v. Sumner, 2 Barb. Ch. 165, 200, 201.
- 5 Greene, 1 Ohio, 244, 251; 13 Am. Dec. 642.
- 6 Matlock, 5 Ind. 403, 407; Bopp v. Fox, 63 Ill. 540, 544.
- 7 Goodburn v. Stevens, 5 Gill, 1, 28; 1 Md. Ch. 420, 439; Dyer v. Clark, 5 Met. 562, 575; 39 Am. Dec. 637.
- 8 Dyer v. Clark, 5 Met. 562, 576; 39 Am. Dec. 697; *post*, § 264.
- 9 Priest, 5 Met. 582, 585; Sumner v. Hampson, 8 Ohio, 328, 364; 32 Am. Dec. 722; *post*, § 258.
- 10 Pierce v. Trigg, 10 Leigh, 405; Wheatley v. Calhoun, 12 Leigh, 264, 273; 37 Am. Dec. 654.
- 11 Smith v. Jackson, 2 Edw. Ch. 23, 35. See Bell v. Phyn, 7 Ves. Jr. 253; Woolidge v. Wilkins, 3 How. (Miss.) 360; Markham v. Marrett, 7 How. (Miss.) 437.
- 12 Loubat v. Nourse, 5 Fla. 350, 357; Matlock, 5 Ind. 403, 406; Galbraith v. Gedge, 16 Mon. B. 631, 634; Dyer v. Clark, 5 Met. 562, 577; 39 Am. Dec. 697; Howard v. Priest, 5 Met. 582, 585; Burnside v. Merrick, 4 Met. 537, 541; Willet v. Brown, 65 Mo. 138, 145; 33 Am. Rep. 265; Campbell, 30 N. J. Eq. 415, 417; Greene, 1 Ohio, 244, 249, 250; 13 Am. Dec. 642.
- 13 Galbraith v. Gedge, 16 Mon. B. 631, 634-636; Goodburn v. Stevens, 5 Gill, 1, 27.
- 14 Willet v. Brown, 65 Mo. 138, 147; 33 Am. Rep. 265; *infra*, n. 15.
- 15 Drewry v. Montgomery, 28 Ark. 256, 259; Loubat v. Nourse, 5 Fla. 350, 357; Matlock, 5 Ind. 403, 407; Galbraith v. Gedge, 16 Mon. B. 631, 634; Divine v. Mitchum, 4 Mon. B. 488, 491; 41 Am. Dec. 241; Goodburn v. Stevens, 5 Gill, 1, 27; Dyer v. Clark, 5 Met. 562, 577; 39 Am. Dec. 697; Howard v. Priest, 5 Met. 582, 585, 586; Burnside v. Merrick, 4 Met. 537, 541; Willet v. Brown, 65 Mo. 138, 148; 33 Am. Rep. 265; Campbell, 30 N. J. Eq. 415, 417.
- 16 Simpson v. Leech, 86 Ill. 286, 287; Bopp v. Fox, 63 Ill. 540, 544; Burnside v. Merrick, 4 Met. 537, 541; Willet v. Brown, 65 Mo. 138, 147; 33 Am. Rep. 265; Sumner v. Hampson, 8 Ohio, 328, 364; 32 Am. Dec. 722.
- 17 Howard v. Priest, 5 Met. 582, 585, 586; Mowry v. Bradley, 11 R. I. 370, 372.
- 18 Hiscock v. Jaycox, 12 Bank. Reg. 507, 511; Simpson v. Leech, 86 Ill. 286, 288; Hale v. Plummer, 6 Ind. 121, 124; Galbraith v. Gedge, 16 Mon. B. 631, 634; Goodburn v. Stevens, 5 Gill, 1, 27; 1 Md. Ch. 420, 440, 441; Campbell, 30 N. J. Eq. 415, 417.
- 19 Huston v. Neil, 41 Ind. 504, 503, 509; Dyer v. Clark, 5 Met. 562, 579; 39 Am. Dec. 697; Goodburn v. Stevens, 5 Gill, 1, 27, 28; Duhring, 20 Mo. 174, 182; Campbell, 30 N. J. Eq. 415, 417; Mowry v. Bradley, 11 R. I. 370, 372.
- 20 See Folsom v. Rhodes, 22 Ohio St. 435, 436; *post*, §§ 258, 261.
- 21 Simpson v. Leech, 86 Ill. 286, 288; Huston v. Neil, 41 Ind. 504, 510; Duhring, 20 Mo. 174, 180; Mowry v. Bradley, 11 R. I. 370, 372.



- 22 *Huston v. Neil*, 14 Ind. 504, 510; *Galbraith v. Gedge*, 16 Mon. B. 631, 635.
- 23 *Greene*, 1 Ohio, 244, 249, 250; 13 Am. Dec. 642; *Thornton v. Dixon*, 3 Bro. C. C. 199; *Park Dow*, 199; 1 *Scribner Dow*, 564.
- 24 *Loubat v. Nourse*, 5 Fla. 350, 357; *Howard v. Priest*, 5 Met. 582, 585; *Willet v. Brown*, 65 Mo. 138, 145, 146; 33 Am. Rep. 265; *Sumner v. Hampson*, 8 Ohio, 328, 364; 32 Am. Dec. 722; 1 *Scribner Dow*, 566.
- 25 *Greene*, 1 Ohio, 244, 250; 13 Am. Dec. 642; cases *supra*, notes 8, 9.
- 26 *Goodburn v. Stevens*, 1 Md. Ch. 420, 440, 441.
- 27 *Wheatley v. Calhoun*, 12 Leigh, 264, 273; 37 Am. Dec. 654.
- 28 *Loubat v. Nourse*, 5 Fla. 350, 357; *Willet v. Brown*, 65 Mo. 138, 147; 33 Am. Rep. 265.
- 29 *Drewry v. Montgomery*, 28 Ark. 256, 260; *Hiscock v. Jaycox*, 12 Bank. Reg. 507, 516.
- 30 *Bopp v. Fox*, 63 Ill. 540, 543.
- 31 *Smith*, 5 Ves. Jr. 189.
- 32 *Drewry v. Montgomery*, 28 Ark. 256, 260. See *supra*, n. 13.

2 258. **Dower and other encumbrances—Priorities.**—Dower is an encumbrance or lien.<sup>1</sup> It is inferior to all liens attaching prior to marriage or to the acquisition of the property by the husband, and to all other liens attaching with the legally given consent of the wife; but superior to all liens attaching during coverture without such consent. Thus, dower is inferior to an antenuptial mortgage<sup>2</sup> or judgment<sup>3</sup> against the husband, or a mortgage on property when purchased by the husband,<sup>4</sup> or a mortgage in which the wife joins;<sup>5</sup> so when property is bought subject to a trust,<sup>6</sup> as when the vendor has an equitable lien for the purchase money,<sup>7</sup> or where the husband before marriage has agreed to sell,<sup>8</sup> or when the property is bought for a partnership and is subject to a trust for partnership uses;<sup>9</sup> it is also inferior to any lien or charge, legal or equitable, having its inception in the contract of purchase,<sup>10</sup> as a mortgage for the purchase money;<sup>11</sup> so it is inferior to the lien for taxes.<sup>12</sup> On the other hand, it is superior to the rights of the husband's heirs and common creditors,<sup>13</sup> and to all judgments obtained against him during coverture,<sup>14</sup> or against his admin-



istrators after his death;<sup>15</sup> to the rights of a purchaser from the husband,<sup>16</sup> and to all leases or encumbrances placed upon the property by the husband alone,<sup>17</sup> so it is superior to mechanic's liens.<sup>18</sup> As a general rule, if the property is sold under a lien superior to dower during coverture, the realty is changed into personalty and dower is gone;<sup>19</sup> but if after coverture, dower is awarded from the surplus.<sup>20</sup> Any sale under an inferior lien must be subject to dower.<sup>21</sup> So if the prior lien is satisfied there is dower.<sup>22</sup>

1 Barnett v. Gaines, 8 Ala. 373, 374; *post*, § 262.

2 Heth v. Cocke, 1 Rand. 344, 346; *post*, §§ 260, 261.

3 Jones v. Miller, 17 S. C. 380, 382, 386.

4 Carll v. Butman, 7 Me. 102; 4 Kent, 50; 1 Scribner Dow. 591; *post*, § 260.

5 Mantz v. Buchanan, 1 Md. Ch. 202, 204; *post*, §§ 260, 261.

6 Cowman v. Hill, 3 Gill & J. 398, 405.

7 Hugunin v. Cochrane, 51 Ill. 302, 305; 2 Am. Rep. 303; *post*, § 259.

8 Adkins v. Holmes, 2 Cart. 197, 199; *ante*, § 252.

9 Willet v. Brown, 65 Mo. 138, 148; 33 Am. Rep. 265; *ante*, § 257.

10 Price v. Hobbs, 47 Md. 350, 382; *ante*, § 252; *post*, § 250.

11 Fontaine v. Boatmen's, 57 Mo. 552, 558; *post*, § 259.

12 Trowbridge v. Sypher, 55 Iowa, 352, 359.

13 Croker v. Fox, 1 Root, 227, 228; Calder v. Bull, 2 Root, 50, 52; Tarpley v. Gannaway, 2 Cold. 246, 248.

14 Sisk v. Smith, 6 Ill. 503, 508; Benoit v. Beard, 4 Md. Ch. 319, 321; Combs v. Young, 4 Yerg. 218, 226; 26 Am. Dec. 225; Tarpley v. Gannaway, 2 Cold. 246, 248, 249.

15 Phinney v. Johnson, 15 S. C. 158, 160.

16 Stoughton v. Leigh, 1 Taunt. 410; Sisk v. Smith, 6 Ill. 503, 507; Gerry v. Stinson, 60 Me. 186, 191; Combs v. Young, 4 Yerg. 218, 226; 26 Am. Dec. 225.

17 Benson v. Scot, 3 Lev. 385, 386; Davis v. McDonald, 42 Ga. 205, 209; Mowbry, 64 Ill. 383; Taylor, 55 Ill. 252; Sutherland, 69 Ill. 481; Miller v. Steffer, 32 Mich. 194; Grady v. McCorkle, 57 Mo. 172; 17 Am. Rep. 676; *post*, § 268.

18 Bishop v. Boyle, 9 Ind. 169, 171. S. P., Gove v. Cather, 23 Ill. 634; Mark v. Murphy, 76 Ind. 534; Van Vronder v. Eastman, 7 Met. 157.

19 See Irvine v. Armistead, 46 Ala. 363; Kintner v. McKrae, 2 Cart. 453; Dean v. Phillips, 17 Ind. 406, 409; Robbins, 8 Blackf. 174; Brown v. Williams, 31 Me. 403; Queen v. Pratt, 10 Md. 5; Bisland v. Hewett, 11 Smedes & M. 164; Bell v. Mayor, 10 Paige, 49, 55; Sandford v. McLean, 3 Paige, 117; 23 Am. Dec. 773; Titus v. Neilson, 5 Johns. Ch. 452, 457; Folsom v. Rhodes, 22 Ohio St. 435, 436; Directors v. Roger, 43 Pa. St. 184; Rose, 6 Heisk. 533; Wilson v. Davison, 2 Rob. (Va.) 398; *post*, § 261.

20 King, 100 Mass. 224, 226 ; *Smith v. Jackson*, 2 Edw. 28, 35. See *Green v. Causey*, 10 Ga. 435 ; *Simons v. Latimer*, 37 Ga. 490 ; *Robbins*, 8 Blackf. 174 ; *Sandford v. McLean*, 3 Paige, 117 ; 23 Am. Dec. 773 ; *post*, § 161 ; *ante*, § 257.

21 *Davis v. McDonald*, 42 Ga. 205, 207.

22 *Mayo v. Hamlin*, 73 Me. 182, 185 ; *post*, § 261.

§ 259. **Dower and purchase money.**—As a general rule, every kind of lien for the purchase money of land is superior to the purchaser's wife's right of dower. If the vendor retains his legal title to the land as security, this is superior to dower ;<sup>1</sup> so is his equitable lien superior, in States where a vendor's equitable lien is recognized,<sup>2</sup> though he has parted with his legal title ;<sup>3</sup> provided, however, that if he has taken other security, his vendor's lien is, in the absence of express agreement, gone,<sup>4</sup> so that even if he obtains judgment against the purchaser for the purchase money, he thereby loses his equitable lien,<sup>5</sup> and the judgment is subsequent to dower.<sup>6</sup> It is very common for the purchaser to take a mortgage for the purchase money, and it is almost universally admitted that such a mortgage is paramount to dower without the joinder of the wife therein,<sup>7</sup> the husband's seisin being instantaneous.<sup>8</sup> The mortgage and the deed may of course be different papers ;<sup>9</sup> and they need not be between the same parties,<sup>10</sup> for a third party who has lent the purchase money and taken a mortgage therefor has the same rights as the vendor would have had,<sup>11</sup> as when A, B, and C meet together, and A deeds to B, and B mortgages to C, who has lent him the money to make the purchase with.<sup>12</sup> Nor need the deed and mortgage be of the same date,<sup>13</sup> or delivered<sup>14</sup> or recorded<sup>15</sup> at the same time : the point is that they must be a part of one and the same transaction.<sup>16</sup> The burden of proof to show this is on the defendant (the vendor) ;<sup>17</sup> he may show it by oral evidence.<sup>18</sup> If the two papers were recorded at the same time, they

are presumed to have been one transaction,<sup>19</sup> though the mortgage be to a third party;<sup>20</sup> and if they are between the same parties, of the same date, acknowledged before the same officer, they are presumed the same transaction,<sup>21</sup> though recorded at different times.<sup>22</sup> A delay of ten months before the execution of the mortgage was held not to affect the mortgagee's rights when it had been a part of the original contract of sale that the mortgage should be given,<sup>23</sup> but otherwise such delay would have been fatal.<sup>24</sup> And if the purchaser pays off the original mortgage with money borrowed on a mortgage on the same property, such latter mortgage is inferior to dower.<sup>25</sup> These rules apply though the wife is an infant,<sup>26</sup> and though the mortgage is in the form of a deed of trust.<sup>27</sup> Whether the vendor reserves his lien or takes a mortgage, very nearly the same rights result, and the rules applicable to mortgages apply.<sup>28</sup> Thus, the wife has dower against all persons except the mortgagor, or vendor, or assigns;<sup>29</sup> she may have dower till the claim of such parties is asserted;<sup>30</sup> if the lien is discharged by payment, she has dower in the land;<sup>31</sup> after her husband's death she may call on his personal representatives to satisfy the lien,<sup>32</sup> or have the other realty exhausted for this purpose;<sup>33</sup> if the lien is enforced during her husband's life her dower is gone;<sup>34</sup> if after his death, she has dower in the surplus;<sup>35</sup> in any case the purchaser takes the land free of dower,<sup>36</sup> if she has been made a party to the proceeding.<sup>37</sup> The vendor's lien is on the land, not on the rents and profits.<sup>38</sup> The husband may reconvey the land to the vendor in satisfaction of the lien,<sup>39</sup> provided that this is not done to defeat the wife's rights.<sup>40</sup> There are statutes declaratory of this law;<sup>41</sup> others enable the husband to sell the land clear of the wife's rights to pay off the vendor's lien;<sup>42</sup> others make a mortgage for the purchase money inferior to dower.<sup>43</sup>

1 *Miller v. Stump*, 3 Gill, 304, 311; *ante*, § 256. See *Thorn v. Ingram*, 25 Ark. 52; *Birnie v. Main*, 29 Ark. 531; *Clements v. Bostwick*, 38 Ga. 1; *Day v. Solomon*, 40 Ga. 32; *Malin v. Coult*, 4 Ind. 535; *Crane v. Palmer*, 8 Blackf. 120; *Thomas v. Hanson*, 44 Iowa, 651; *Barnes v. Gay*, 7 Iowa, 26; *Naz. Lit. v. Lowe*, 1 Mon. B. 257; *Willett v. Beatty*, 12 Mon. B. 172; *McClure v. Harris*, 12 Mon. B. 261; *Glenn v. Clark*, 53 Md. 580; *Walton v. Hargroves*, 42 Miss. 18; *Cocke v. Baily*, 42 Miss. 81; *Warner v. Van Alstyne*, 3 Paige, 513; *Kirby v. Dalton*, 1 Dev. Ch. 175; *Firestone*, 2 Ohio St. 415; *Pritts v. Ritchey*, 29 Pa. St. 71; *Boyd v. Martin*, 9 Heisk. 382; *Wilson v. Davisson*, 2 Rob. (Va.) 384.

2 It is adopted in Alabama, Arkansas, California, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Maryland, Michigan, Mississippi, Missouri, New York, Ohio, Tennessee, Texas, and Virginia. It is rejected in Maine, North Carolina, Pennsylvania, and Vermont. Its existence is doubtful in Connecticut, Delaware, and Massachusetts; *Hare & W. notes*, 1 Lead. Cas. in Eq. 481; 1 Wash. Real Prop. 508, n; 1 Scribner Dow. 555, n. 2.

3 *Brooks v. Woods*, 40 Ala. 538, 541. See *Thorn v. Ingram*, 25 Ark. 52; *Meigs v. Dimock*, 6 Conn. 458; *Slaughter v. Culpepper*, 44 Ga. 319; *Fletcher v. Holmes*, 32 Ind. 447; *Carver v. Grove*, 68 Ind. 371; *Talbott v. Armstrong*, 14 Ind. 254; *Noyes v. Kramer*, 54 Iowa, 22; *Thomas v. Hanson*, 44 Iowa, 651; *McClure v. Harris*, 12 Mon. B. 261; *King v. Ayer*, 53 Me. 138; *Price v. Hobbs*, 47 Md. 359; *Rawlings v. Lowndes*, 34 Md. 639; *Smith v. McCarty*, 119 Mass. 519; *Bisland v. Hewett*, 11 Smedes & M. 164; *Cocke v. Bailey*, 42 Miss. 81; *Duke v. Brandt*, 51 Mo. 221; *Warner v. Van Alstyne*, 3 Puige, 513; *Brckett v. Baum*, 50 N. Y. 8; *Culber v. Harper*, 27 Ohio St. 464; *Fox v. Pratt*, 27 Ohio St. 512; *Calmes v. McCracken*, 8 S. C. 87; *Williams v. Woods*, 1 Humph. 408; *Blair v. Thompson*, 11 Gratt. 441; *George v. Cooper*, 15 W. Va. 666.

4 *McClure v. Harris*, 12 Mon. B. 261, 264; *Blair v. Thompson*, 11 Gratt. 446, 452. See *Meigs v. Dimock*, 6 Conn. 458; *Clements v. Bostwick*, 38 Ga. 1; *Hart v. Logan*, 49 Mo. 47; *Hollis*, 4 Baxt. 524; *Gregg v. Jones*, 5 Heisk. 443; 1 Lead. Cas. in Eq. 262-281.

5 *McArthur v. Porter*, 1 Ohio, 99, 101.

6 *Steuart v. Beard*, 4 Md. Ch. 319, 321; *ante*, § 258.

7 *Maybury v. Brien*, 15 Peters, 21, 38; *ante*, § 252. *S. P.*, *Eslava v. Lepretre*, 21 Ala. 504, 528; 56 Am. Dec. 266; *Baker v. McCune*, 82 Ind. 339, 341; *Thomas v. Hanson*, 44 Iowa, 651, 652; *Grant v. Dodge*, 43 Me. 489, 490; *Gage v. Ward*, 25 Me. 101, 130; *Gammon v. Freeman*, 31 Me. 240, 245; *Glenn v. Clark*, 53 Md. 580, 604; *Ifeisler v. Nickum*, 38 Md. 270, 277; *Rawlings v. Lowndes*, 34 Md. 639, 642; *Smith v. McCartney*, 119 Mass. 519, 520; *King v. Stetson*, 11 Allen, 407, 408; *Pendleton v. Pomeroy*, 4 Allen, 501, 511; *Fontaine v. Boatmen's*, 57 Mo. 552, 558, 559; *Bullard v. Bowers*, 10 N. H. 500, 502; *Griggs v. Smith*, 12 N. J. L. 22, 23; *Kittle v. Van Dyck*, 1 Sand. Ch. 76. 81; *Stow v. Tift*, 15 Johns. 459, 462, 463; 8 Am. Dec. 266; *Gowan v. Smith*, 44 Barb. 232, 239; *Welsh v. Buckins*, 9 Ohio St. 331, 333; *Gilliam v. Moore*, 4 Leigh, 30, 32; 24 Am. Dec. 704; *Wheatley v. Calhoun*, 12 Leigh, 264, 274; 37 Am. Dec. 654; *George v. Cooper*, 15 W. Va. 666, 672; *Jones v. Parker*, 51 Wls. 218, 223. *Contra*, *Slaughter v. Culpepper*, 44 Ga. 319, 320; *McClure v. Harris*, 12 Mon. B. 261, 266; *Reed v. Morrison*, 12 Serg. & R. 18, 21.

8 *Rawlings v. Lowndes*, 34 Md. 639, 643; *ante*, § 252.

9 *Stow v. Tift*, 15 Johns. 459, 462, 463; 8 Am. Dec. 266.

10 *Gammon v. Freeman*, 31 Me. 243, 245.

11 *Boynton v. Sawyer*, 35 Ala. 499, 500; *Thomas v. Hanson*, 44 Iowa, 651, 652; *Moore v. Rollins*, 45 Me. 433, 494; *Glenn v. Clark*, 53 Md. 580,

604; *McCanley v. Grimes*, 2 Gill & J. 318, 324; 20 Am. Dec. 434; *King v. Stetson*, 11 Allen, 407, 408; *McGowan v. Smith*, 44 Barb. 232, 237; *Welsh v. Buckins*, 9 Ohio St. 331, 333; *Jones v. Parker*, 51 Wis. 218, 223.

12 *Jones v. Parker*, 51 Wis. 218, 223. Compare *Spencer v. Lee*, 10 W. Va. 179, 193.

13 *Gammon v. Freeman*, 21 Me. 101, 103; *Rawlings v. Lowndes*, 34 Me. 639, 642.

14 *Fontaine v. Boatmen's*, 57 Mo. 552, 553.

15 *McGowan v. Smith*, 44 Barb. 232, 238; *Wheatley v. Calhoun*, 12 Leigh, 264, 274; 37 Am. Dec. 654.

16 *Gage v. Ward*, 25 Me. 101, 103; *Rawlings v. Lowndes*, 34 Md. 639, 643; *Smith v. McCartney*, 119 Mass. 519, 520; *King v. Stetson*, 11 Allen, 407, 408; *Fontaine v. Boatmen's*, 57 Mo. 552, 553; *Stow v. Tift*, 15 Johns. 459, 463; 8 Am. Dec. 266; *Wheatley v. Calhoun*, 12 Leigh, 264, 274; 37 Am. Dec. 654; *Gilliam v. Moore*, 4 Leigh, 30, 32; 24 Am. Dec. 704.

17 *Grant v. Dodge*, 43 Me. 489, 490; *Fontaine v. Boatmen's*, 57 Mo. 552, 553.

18 *Fontaine v. Boatmen's*, 57 Mo. 552, 559.

19 *Pendleton v. Pomeroy*, 4 Allen, 510, 511.

20 *Moore v. Rollins*, 45 Me. 493, 494; *Glenn v. Clark*, 53 Md. 530, 605, 606; *Cunningham v. Knight*, 1 Barb. 399.

21 *Moore v. Rollins*, 45 Me. 493, 494, 495.

22 *McGowan v. Smith*, 44 Barb. 232, 239.

23 *Wheatley v. Calhoun*, 12 Leigh, 264, 274; 37 Am. Dec. 654. See *Kittle v. Van Dyck*, 1 Sand. Ch. 76, 81.

24 *Rawlings v. Lowndes*, 34 Md. 639, 642.

25 *Gage v. Ward*, 25 Me. 101, 103; *Westfall v. Hintze*, 7 Abb. N. C. 236; *Calmes v. McCracken*, 8 S. C. 87, 99.

26 *Glenn v. Clark*, 53 Md. 530, 604.

27 *George v. Cooper*, 15 W. Va. 666, 672.

28 See *post*, §§ 260, 261.

29 *Boynton v. Sawyer*, 35 Ala. 497, 500; *Rawlings v. Lowndes*, 34 Md. 639, 642; *Whitehead v. Middleton*, 2 How. (Miss.) 692, 696.

30 *Thompson*, 1 Jones, 430. See *Tucker v. Field*, 51 Miss. 19; *Pickett v. Buckner*, 45 Miss. 226; *Tarpley v. Gunnaway*, 2 Cold. 245; *James v. Fields*, 5 Heisk. 394; *Perkins v. McDonald*, 3 Baxt. 343.

31 *Bullard v. Bowers*, 10 N. H. 500, 502.

32 *Warner v. Van Alstyne*, 3 Paige, 513. See *post*, § 261.

33 *Caroon v. Cooper*, 63 N. C. 386, 388. See *post*, § 261.

34 Consult cases *infra*, n. 35; *post*, § 261.

35 *Brooks v. Woods*, 40 Ala. 538, 541. S. P., *Willetts v. Beatty*, 12 Mon. B. 172; *Warner v. Van Alstyne*, 3 Paige, 513; *Thompson*, 1 Jones, 430; *Klutts*, 5 Jones Eq. 80; *Williams v. Woods*, 1 Humph. 408.

36 *Barnes v. Gay*, 7 Iowa, 26; *Naz. Lit. v. Lowe*, 1 Mon. B. 257; *Bisland v. Hewett*, 11 Smedes & M. 164; *Riddicle v. Walsh*, 15 Mo. 519; *Williams v. Woods*, 1 Humph. 408; *Wilson v. Davisson*, 2 Rob. Va. 384.

37 *McArthur v. Porter*, 1 Ohio, 99, 101. See *Willetts v. Beatty*, 12 Mon. B. 172; *Smith v. Gardner*, 42 Barb. 357; *post*, § 261.

38 *Wilson v. Ewing*, 79 Ky. 549, 550.

39 *Huganin v. Cochraue*, 51 Ill. 302, 305; 2 Am. Rep. 303; *ante*, § 256.

40 Hugunin v. Cochrane, 51 Ill. 302, 305 ; 2 Am. Rep. 303 ; *post*, § 268.

41 Baker v. McCune, 82 Ind. 339, 341 ; *ante*, § 247.

42 Melone v. Armstrong, 79 Ky. 248, 249.

43 Slaughter v. Culpepper, 44 Ga. 319, 320.

§ 260. **Dower in mortgaged lands.**—When land is mortgaged, the mortgagee holds the mortgage simply as security ;<sup>1</sup> his interest is a chattel interest which goes to his personal representatives on his death,<sup>2</sup> and though he has the legal title to the property, at all events after default,<sup>3</sup> he is seized simply as trustee ;<sup>4</sup> therefore, since there is no dower in a chattel interest<sup>5</sup> or a bare legal title,<sup>6</sup> it has always been admitted that the wife of a mortgagee has no dower in the mortgaged lands,<sup>7</sup> unless he has perfected his title thereto by foreclosure during his life.<sup>8</sup> The mortgagor has, on the other hand, the full substantial ownership of the mortgaged property until foreclosure,<sup>9</sup> and has generally now the legal title reserved until default,<sup>10</sup> which gives him an estate on condition, dower in which may be defeated by breach of the condition ;<sup>11</sup> but after default, at all events, he has only an equitable estate,<sup>12</sup> the right to clear off the encumbrance by payment, called the equity of redemption.<sup>13</sup> At common law there was no dower in equitable estates,<sup>14</sup> and therefore in an equity of redemption ;<sup>15</sup> so that the wife of the mortgagor could no more have dower at common law than the wife of the mortgagee ;<sup>16</sup> still, the mortgagor's wife had dower if the mortgage were for years only.<sup>17</sup> But now either by an express statute or as equitable estates,<sup>18</sup> equities of redemption are subject to dower.<sup>19</sup> And this rule applies to all cases when the mortgage is paramount to dower ;<sup>20</sup> i. e., whether the land was bought subject to the mortgage,<sup>21</sup> or the mortgage was made by the husband before his marriage,<sup>22</sup> or after marriage jointly with his wife,<sup>23</sup> or after marriage without her

joinder, as a part of the transaction which vested the property in him.<sup>24</sup> In these cases there is no dower in the lands but only in the equity of redemption.<sup>25</sup> In other cases when the mortgage is made after marriage without the wife's joinder, her dower is paramount thereto, and she has dower in the lands as if there were no mortgage,<sup>26</sup> except where she has dower only of the lands of which the husband dies seized.<sup>27</sup> She may show that a deed absolute on its face was in fact only a mortgage.<sup>28</sup> When she has dower in an equity of redemption, if the husband dies without default, she may be endowed out of the lands and hold them until default;<sup>29</sup> for even when she joins in the mortgage she releases her rights only as to the mortgagee,<sup>30</sup> and as to him only to the extent that the husband releases his.<sup>31</sup> If the husband dies after default and the mortgagee has taken possession, the widow cannot disturb him or have dower,<sup>32</sup> unless the property has been redeemed<sup>33</sup> or sold under the mortgage.<sup>34</sup>

1 *Crittenden v. Johnson*, 6 Eng. 94, 104.

2 *Reid v. Shipley*, 6 Vt. 602, 609; *Denton v. Nanny*, 8 Barb. 618, 621.

3 *Stelle v. Carroll*, 12 Peters, 201, 205; *Maybury v. Brien*, 15 Peters, 21, 38; *Pickett v. Buckner*, 45 Miss. 223, 244; *Bell v. Mayor*, 10 Paige, 49, 54.

4 *Dawson v. Whitehaven*, Law R. 6 Ch. D. 218, 221; *Dixon v. Saville*, 1 Bro. C. C. 326.

5 *Spangler v. Stanier*, 1 Md. Ch. 36, 37; *ante*, § 254.

6 *Gully v. Ray*, 18 Mon. B. 107, 114; *ante*, §§ 252, 256.

7 *Foster v. Dwinel*, 49 Me. 44, 53. See *Nash v. Preston*, Cro. Car. 190; *Hinton*, 2 Ves. Jr. 631; *Noel v. Jevon*, Freem. 43, 71; Ark. Dig. 1874, § 2216; *Crittenden v. Johnson*, 6 Eng. 94, 104; Ill. R. S. 1880, p. 425, § 6; N. Y. R. S. 1882, p. 2197, § 7; *Cooper v. Whitney*, 3 Hill, 94, 100; *Reid v. Shipley*, 6 Vt. 602, 609; *Waller*, 33 Gratt. 83, 86; 1 Wash. Real Prop. p. 163, § 15; 1 Scribner Dow. 477, 478.

8 *Foster v. Dwinel*, 49 Me. 44, 53.

9 *Titus v. Neilson*, 5 Johns. Ch. 452, 454; *Denton v. Nanny*, 8 Barb. 618, 621, 623; *Bell v. Mayor*, 10 Paige, 49, 54, 63.

10 See *Bank v. Arnold*, 5 Paige, 33, 41; *Danforth v. Smith*, 23 Vt. 247, 253; *infra*, n. 23.

11 *Moore v. Esty*, 5 N. H. 479; *ante*, § 254.

12 *Stelle v. Carroll*, 12 Peters, 201, 205.

13 *Heth v. Cocke*, 1 Rand. 344, 346.



14 Ransom, 17 Fed. Rep. 331, 333; *ante*, § 256.

15 Dixon v. Saville, 1 Bro. C. C. 326; Dawson v. Whitehaven, Law R. 6 Ch. D. 218, 221; Maybury v. Brien, 15 Peters, 21, 38; Cox v. Garst, 105 Ill. 342, 346; Glenn v. Clark, 53 Md. 580, 607; Pickett v. Buckner, 45 Miss. 226, 243; Denton v. Nanny, 8 Barb. 618, 620; Reed v. Morrison, 12 Serg. & R. 18, 20; Eddy v. Moulton, 13 R. I. 105, 106.

16 See Hopkinson v. Dumas, 42 N. H. 206.

17 Palmes v. Danby, Prec. Ch. 137; Swaine v. Perine, 5 Johns. Ch. 432, 491; Heth v. Cocke, 1 Rand. 244, 346; Park Dow. 140, 350, 351; 1 Scribner Dow. 476.

18 Maybury v. Brien, 15 Peters, 21, 38.

19 3 and 4 Wm. IV. ch. 105, § 2; Dawson v. Whitehaven, Law R. 6 Ch. D. 218, 221; Ala. Code 1876, § 2232; Fry v. Merchants, 15 Ala. 810; Eslava v. Lepretre, 21 Ala. 501; 56 Am. Dec. 266; Cheek v. Waldrum, 25 Ala. 152; Ark. Dig. 1874, § 2213; Cockerill v. Armstrong, 31 Ark. 580; Fish, 1 Conn. 559; Conn. Laws 1877, p. 211; Cornog, 3 Del. Ch. 407; D. C. R. C. 1857, p. 185, § 41; McMahon v. Russell, 17 Fla. 698; Hart v. McCollum, 28 Ga. 473; Rust v. Billingslea, 44 Ga. 146, 306; Kinnebrew v. McWharter, 61 Ga. 33; Ill. R. S. 1880, p. 425, § 3; Fisk v. Smith, 1 Gilm. 506; Blain v. Harrison, 11 Ill. 384; Gold v. Ryan, 14 Ill. 53; Burson v. Dow, 65 Ill. 146; Cox v. Garst, 105 Ill. 342, 347; Ky. R. S. 1879, p. 527; McClure v. Harris, 12 Mon. B. 261; Willett v. Beatty, 12 Mon. B. 172; Tevis v. Steele, 4 Mon. 339; Brewer v. Van Arsdale, 6 Dana, 204; Harrow v. Johnson, 3 Met. (Ky.) 578; Me. R. S. 1371, p. 753, § 12; Nason v. Allen, 6 Me. 243; Smith v. Eustis, 7 Me. 41; Carll v. Butman, 7 Me. 102; Hobbs v. Harvey, 16 Me. 80; Campbell v. Knights, 24 Me. 332; 45 Am. Dec. 107; Gage v. Ward, 24 Me. 101; Gammon v. Freeman, 31 Me. 243; Littlefield v. Crocker, 30 Me. 192; Manning v. Laboree, 33 Me. 343; Simonton v. Gray, 34 Me. 50; Smith v. Stanley, 37 Me. 11; Young v. Tarbell, 37 Me. 507; Grant v. Dodge, 43 Me. 489; Wilkins v. French, 20 Me. 111; Moore v. Rollins, 45 Me. 493; Barbour, 46 Me. 9; Wing v. Ayer, 53 Me. 123; Hatch v. Palmer, 58 Me. 271; Mass. R. S. 1882, p. 741, § 5; Snow v. Stevens, 15 Mass. 278; Barker v. Parker, 17 Mass. 561; Peabody v. Patten, 2 Pick. 517, 519; Gibson v. Crehore, 5 Pick. 146; 3 Pick. 475; Walker v. Griswold, 6 Pick. 416; Eaton v. Simonds, 14 Pick. 98; Jennison v. Hapgood, 14 Pick. 345; 19 Am. Dec. 258; Van Vronker v. Eastman, 7 Met. 157; Messiter v. Wright, 16 Pick. 151; Lund v. Woods, 11 Met. 565; Niles v. Nye, 13 Met. 135; Newton v. Cook, 4 Gray, 46; Pynchon v. Lester, 6 Gray, 314; King 100 Mass. 224; Lamb v. Montague, 112 Mass. 352, 353; Md. R. C. 1878, p. 397; Hopkins v. Fry, 2 Gill, 359; Miller v. Stump, 3 Gill, 304; Chew v. Farmers, 9 Gill, 361; Mantz v. Buchanan, 1 Md. Ch. 202; Bank v. Owens, 31 Md. 320; Glenn v. Clark, 53 Md. 580; Snyder, 6 Mich. 470; Newton v. Sly, 15 Mich. 391; Mo. R. S. 1879, p. 263; Atkinson v. Stewart, 46 Mo. 510; Atkinson v. Angert, 46 Mo. 515; Pinkham v. Gear, 3 N. H. 163; Moore v. Esty, 5 N. H. 479; Cass v. Martin, 6 N. H. 25; Robinson v. Leavitt, 7 N. H. 93; Bullard v. Bowers, 10 N. H. 500; Rossiter v. Cossit, 15 N. H. 33; Clough v. Elliott, 23 N. H. 182; Adams v. Hill, 29 N. H. 202; Hastings v. Stevens, 29 N. H. 564; Woods v. Wallace, 30 N. H. 384; Copp v. Hersey, 31 N. H. 317; Hinds v. Ballou, 44 N. H. 619; Montgomery v. Brouere, 5 N. J. L. 865; Woodhull v. Reid, 16 N. J. L. 128; Yeo v. Mercereau, 18 N. J. L. 387; Thompson v. Boyd, 21 N. J. L. 58, 22 N. J. L. 543; Hartshorne, 2 N. J. Eq. 349; Hinchman v. Stiles, 9 N. J. Eq. 361, 451; Furman v. Clark, 11 N. J. Eq. 135; Hays v. Whittall, 13 N. J. Eq. 211; Vreeland v. Jacobus, 19 N. J. Eq. 231; Campbell, 30 N. J. Eq. 415; N. Y. R. S. 1882, p. 2197; Titus v. Nelson, 5 Johns. Ch. 452, 455; Coates v. Cheever, 1 Cowen, 460; Jackson v. Dewitt, 6 Cowen, 316; Stow v. Tilt, 15 Johns. 458; 8 Am. Dec. 266; Hitchcock v. Harrington, 6 Johns. 200; 5 Am. Dec. 229; Van Dyne v. Thayre, 14 Wend. 233; 15 Wend. 162; Wheeler v. Morris, 2 Bosw.



524; *Smith v. Jackson*, 2 Edw. Ch. 28; *Frost v. Peacock*, 4 Edw. Ch. 673; *Tabele*, 1 Johns. Ch. 45; *Swaine v. Perine*, 5 Johns. Ch. 422; *Bell v. Mayor*, 10 Paige, 41; *Hawley v. James*, 5 Paige, 318; *Denton v. Nanny*, 8 Barb. 613; *Vartie v. Underwood*, 18 Barb. 562; *Mills v. Van Voorhies*, 23 Barb. 125; 20 N. Y. 412; *Smith v. Gardner*, 42 Barb. 357; *Matthews v. Duryea*, 45 Barb. 61; *Ross v. Boardman*, 22 Hun, 527; *Brackett v. Baum*, 50 N. Y. 8; *Elmdorf v. Lockwood*, 57 N. Y. 322; N. C. Rev. 1873, p. 839; *Thompson*, 1 Jones, 430; *Klutts*, 5 Jones Eq. 80; *Campbell v. Murphy*, 2 Jones Eq. 357; *Creedy v. Pearce*, 60 N. C. 67; *Ohio R. S.* 1880, § 4188; *Rands v. Kendall*, 15 Ohio, 671; *Taylor v. Fowler*, 18 Ohio, 567; 51 Am. Dec. 461; *Carter v. Goodin*, 3 Ohio St. 75; *Davenport v. Sovil*, 6 Ohio St. 459; *Culber v. Harper*, 27 Ohio St. 461; *Forr v. Pratt*, 27 Ohio St. 512; *Unger v. Leiter*, 32 Ohio St. 210; *Ketchum v. Shaw*, 23 Ohio St. 503; *Folsom v. Rhodes*, 22 Ohio St. 435; *Oreg. G. L.* 1874, p. 534; *Dubs*, 7 Cas. 119; *Reed v. Morrison*, 12 Serg. & R. 18; *R. I. P. S.* 1832, p. 617; *Mathewson v. Smith*, 1 R. I. 22; *Peckham v. Nowden*, 8 R. I. 160; *De Wolf v. Murphy*, 11 R. I. 360; *Henegan v. Harilee*, 10 Rich. Eq. 235; *Keckley*, 2 Hill. Ch. (S. C.) 250; *Keith v. Trapier*, 1 Ball. Ch. 63; *Brown v. Duncan*, 4 McCord, 346; *Tenn. R. S.* 1871, § 2339; *James v. Fields*, 5 Heisk. 394; *Boyer*, 1 Cold. 12; *Tarpley v. Gunnaway*, 2 Cold. 245; *Turbeville v. Gibson*, 5 Heisk. 565; *Va. Code* 1873, p. 853; *Heth v. Cocke*, 1 Rand. 344; *Wheatley v. Calhoun*, 12 Leigh, 264; 37 Am. Dec. 654; *Daniel v. Leitch*, 13 Gratt. 195; *Vt. R. S.* 1880, § 2216; *Danforth v. Smith*, 23 Vt. 247; *Wis. R. S.* 1878, p. 626; *ante*, § 256.

20 See *ante*, § 258.

21 *Carll v. Butman*, 7 Me. 102. See *Campbell*, 30 N. J. Eq. 415.

22 *Heth v. Cocke*, 1 Rand. 344, 346.

23 *Cox v. Garst*, 105 Ill. 342, 347. S. P., *Mantz v. Buchanan*, 1 Md. Ch. 202, 204; *Glenn v. Clark*, 53 Md. 580, 604; *Bank v. Owens*, 31 Md. 320, 325; *Denton v. Nanny*, 8 Barb. 618, 620; *State v. Hinton*, 21 Ohio St. 509, 515; *Mathewson v. Smith*, 1 R. I. 22, 27.

24 *House*, 10 Paige, 158, 164. S. P., *Smith v. Eustis*, 7 Me. 41; *Holbrook v. Finney*, 4 Mass. 566; 3 Am. Dec. 243; *Bell v. Mayor*, 10 Paige, 41, 54; *ante*, § 253.

25 *Opdyke v. Bartles*, 11 N. J. Eq. 133, 134; *Heth v. Cocke*, 1 Rand. 344, 346.

26 *Davis v. McDonald*, 42 Ga. 205, 207; *Gerry v. Stinson*, 60 Me. 186, 191.

27 See *Tenn. R. S.* 1873, § 2338; *ante*, § 247. Mortgage *pro tanto* an alienation: *Bell v. Mayor*, 10 Paige, 41, 55.

28 *Whitcomb v. Sutherland*, 18 Ill. 573, 579; *Johnson v. Van Velsion*, 43 Mich. 208, 214; *Turbeville v. Gibson*, 5 Heisk. 565, 566.

29 *Bank v. Arnold*, 5 Paige, 38, 41; *Danforth v. Smith*, 23 Vt. 247, 250. S. P., *Cockerill v. Armstrong*, 31 Ark. 580; *Ready v. Hamm*, 46 Miss. 422; *Tucker v. Field*, 51 Miss. 191; *Pickett v. Buckner*, 45 Miss. 226; *Culber v. Harper*, 27 Ohio, 464; *Perkins v. McDonald*, 3 Baxt. 343; *Tarpley v. Gunnaway*, 2 Cold. 245; *James v. Fields*, 5 Heisk. 394.

30 *Young v. Tarbell*, 37 Me. 509, 515; *Pickett v. Buckner*, 45 Miss. 226, 246; *Bell v. Mayor*, 10 Paige, 49, 65; *Mathewson v. Smith*, 1 R. I. 22, 27.

31 *Bank v. Arnold*, 5 Paige, 38, 41.

32 *Van Dyne v. Thayre*, 14 Wend. 233, 236.

33 *Bell v. Mayor*, 10 Paige, 49, 54; *post*, § 261.

34 *Smith v. Jackson*, 2 Edw. 28, 25; *post*, § 261.

H. & W. — 33.

§ 231. **Dower in mortgaged estates—Redemption and foreclosure.**—When the mortgage is in default after the husband's death, the widow may call on his personal representatives to redeem out of the assets of the estate;<sup>1</sup> this it is the executors' or administrators' duty to do,<sup>2</sup> but in some States only if the estate is solvent;<sup>3</sup> and the widow need not contribute;<sup>4</sup> if there are not sufficient assets to pay the whole, they must pay what they have and save as far as possible the widow's dower.<sup>5</sup> The widow has herself the right to redeem,<sup>6</sup> but she must pay the whole debt,<sup>7</sup> unless the mortgagee agrees to accept a proportion thereof and to release the mortgage only as to her dower lands;<sup>8</sup> if she does pay the whole debt, she may call on the husband's heirs, or other parties holding under him, to contribute,<sup>9</sup> though this seems doubtful.<sup>10</sup> If the parties holding under the husband redeem after his death,<sup>11</sup> the widow may have her dower only by contributing her share of the debt.<sup>12</sup> The widow's share for contribution is the interest on one third of the sum paid for redemption, during her life, or the equivalent thereof.<sup>13</sup> For, though there is a rule that there is no dower in any equitable estate of which the husband does not die seized,<sup>14</sup> and though this has been applied to equities of redemption,<sup>15</sup> generally the widow does take dower, although the husband has aliened the equity of redemption<sup>16</sup>—certainly if the mortgage was one in which she joined<sup>17</sup>—on the ground that the mortgage is merely a security which can be set up only by the mortgagee or his assigns;<sup>18</sup> and if the alienee has redeemed during the husband's life, he cannot make the widow contribute,<sup>19</sup> though he can if he redeem after the husband's death,<sup>20</sup> or if he be assignee of the husband's heir.<sup>21</sup> If the mortgagee buys in the equity of redemption there is strictly a merger,<sup>22</sup> but

practically it is treated as a redemption;<sup>23</sup> so if the assignee of the equity buys in the mortgage.<sup>24</sup> If the husband or any one for him<sup>25</sup> pays off the mortgage, there is dower as if no mortgage had existed.<sup>26</sup> If the mortgage is foreclosed during coverture, the realty is changed into personalty<sup>27</sup> under alien paramount to dower, and dower is gone;<sup>28</sup> but some courts have held that on account of her inchoate right the wife must be a party to the foreclosure suit,<sup>29</sup> and that if there is a surplus, dower therein will be set aside and kept for her.<sup>30</sup> If the mortgage is foreclosed after the husband's death,<sup>31</sup> or the fund has not been distributed at that time,<sup>32</sup> she has dower in the surplus,<sup>33</sup> which represents the value of the equity of redemption,<sup>34</sup> and in the surplus only;<sup>35</sup> if there is no surplus, dower is gone,<sup>36</sup> provided that she has been duly made a party to the suit.<sup>37</sup>

1 *Mantz v. Buchanan*, 1 Md. Ch. 202, 204. See *Boynton v. Sawyer*, 35 Ala. 497, 500; *Morgan v. Sackett*, 57 Ind. 580, 582; *Perry v. Barton*, 25 Ind. 274, 277; *Hunsucker v. Smith*, 49 Ind. 114, 118; *Harrow v. Johnson*, 3 Met. (Ky.) 578, 581; *King*, 100 Mass. 224, 225; *Rossiter v. Cossit*, 15 N. H. 38, 42-44; *Holmes*, 3 Paige Ch. 363; *Warner v. Van Alstyne*, 3 Paige, 513; *Campbell v. Murphy*, 2 Jones Eq. 357; *Creecy v. Pearce*, 69 N. C. 67; *Mathewson v. Smith*, 1 R. I. 22, 25; *Henegan v. Harlee*, 10 Rich. Eq. 285; *Keckley*, 2 Hill Ch. 250.

2 *Morgan v. Sackett*, 57 Ind. 580, 582; *Mathewson v. Smith*, 1 R. I. 22, 25; *supra*, n. 55.

3 *Rossiter v. Cossit*, 15 N. H. 38, 42. See *Whitehead v. Cummings*, 1 Cart. 55; *Gibson v. Crehore* 5 Pick. 146, 153; *Hastings v. Stevens*, 29 N. H. 564, 572.

4 *Rossiter v. Cossit*, 15 N. H. 38, 43; *supra*, n. 1.

5 *Hunsucker v. Smith*, 49 N. H. 114, 118; *Perry v. Barton*, 25 Ind. 274, 276. Consult *supra*, n. 35.

6 *Whitcomb v. Sutherland*, 13 Ill. 578, 579; *Lamb v. Montague*, 112 Mass. 352, 353; *Woods v. Wallace*, 30 N. H. 384, 388; *Wheeler v. Morris*, 2 Bosw. 524, 536; *Robinson v. Shacklett*, 29 Gratt. 99, 107. See *Hitchins*, 2 Vern. 403; *Fry v. Merchants*, 15 Ala. 810; *McMahon v. Russell*, 17 Fla. 638; *Hanover v. Johnson*, 3 Met. (Ky.) 578; *Gage v. Ward*, 25 Me. 101, 103; *Peabody v. Patten*, 2 Pick. 517, 519; *Snyder*, 6 Mich. 470; *Furman v. Clark*, 11 N. J. Eq. 135; *Cass v. Martin*, 6 N. H. 25, 26; *Van Dyne v. Thayer*, 14 Wend. 233; 19 Wend. 162; *Ketchum v. Shaw*, 23 Ohio St. 503; *Reed v. Morrison*, 12 Serg. & R. 18, 21; *Henegan v. Harlee*, 10 Rich. Eq. 285; *Heth v. Cocke*, 1 Rand. 344, 348; *Danforth v. Smith*, 23 Vt. 247.

7 *McCabe v. Bellows*, 7 Gray, 143, 149. S. P. *McMahon v. Russell*, 17 Fla. 638, 703; *Kinnebrew v. McWharter*, 61 Ga. 33, 34; *McMahon*

v. Kimball, 3 Blackf. 1, 12; Watson v. Clendenin, 6 Blackf. 477, 478; Gage v. Ward, 25 Me. 101, 103; Campbell v. Knights, 24 Me. 332, 334; 45 Am. Dec. 107; Wing v. Ayer, 53 Me. 138; Purdy, 3 Md. Ch. 547; Gibson v. Crehore, 5 Pick. 145, 151; Jessiter v. Wright, 16 Pick. 151, 153; Sneed v. Wood, 11 Met. 566, 570; Brown v. Lapham, 3 Cush. 551, 554; Rossiter v. Cossit, 15 N. H. 38, 43; Bell v. Mayor, 10 Paige, 49, 71; Van Duyne v. Thayre, 14 Wend. 223, 236; 19 Wend. 162; Wheatley v. Calhoun, 12 Leigh, 264; 37 Am. Dec. 654; Heth v. Cocke, 1 Rand. 344, 346.

8 Gibson v. Crehore, 5 Pick. 145, 151.

9 Pickett v. Buckner, 45 Miss. 226, 246. See 1 Scribner Dow. 498, 499; McMahan v. Kimball, 3 Blackf. 1, 12; Carl v. Butman, 7 Me. 102; Gage v. Ward, 25 Me. 101, 103; Wilkins v. French, 20 Me. 111; Gibson v. Crehore, 5 Pick. 146, 152; Woods v. Wallace, 30 N. H. 384, 388; Swaine v. Perine, 5 Johns. Ch. 482; Bell v. Mayor, 10 Paige, 49.

10 Consult cases cited *supra*, n. 9.

11 Eaton v. Simonds, 14 Pick. 98, 107; cases *infra*, n. 12.

12 Swaine v. Perine, 5 Johns. Ch. 482, 491. S. P., McMahon v. Russell, 17 Fla. 638, 705; Cox v. Garst, 105 Ill. 342, 347; Watson v. Clendenin, 6 Blackf. 477; Mantz v. Buchanan, 1 Md. Ch. 202; Bank v. Owens, 31 Md. 320; Carl v. Butman, 7 Me. 102; Simonton v. Gray, 34 Me. 50; Moore v. Rollins, 45 Me. 493; Barbour, 46 Me. 9; Wilkins v. French, 20 Me. 111; Hatch v. Palmer, 58 Me. 271; King, 100 Mass. 224; Sergeant v. Fuller, 105 Mass. 119; Pyncheon v. Lester, 6 Gray, 314; Eaton v. Simonds, 14 Pick. 98, 104, 107, 108; McCabe v. Bellows, 7 Gray, 148; Niles v. Nye, 13 Met. 135; Newton v. Cook, 4 Gray, 46; Atkinson v. Stewart, 46 Mo. 510; Atkinson v. Angert, 46 Mo. 575; Seavey v. Malory, 62 Mo. 485; Hinds v. Ballou, 44 N. H. 619; Copp v. Hersey, 31 N. H. 317; Woods v. Wallace, 30 N. H. 384; Hastings v. Stevens, 29 N. H. 561; Wheeler v. Morris, 2 Bosw. 524; Bell v. Mayor, 10 Paige, 49; House, 10 Paige, 158; Creecy v. Pearce, 60 N. C. 67; Fox v. Pratt, 27 Ohio St. 512; Wheatley v. Calhoun, 12 Leigh, 264; 37 Am. Dec. 654.

13 Swaine v. Perine, 5 Johns. Ch. 482, 493. See Greenbaum v. Austrian, 70 Ill. 591; Bank v. Owens, 31 Md. 320; Gibson v. Crehore, 5 Pick. 146, 152; Cass v. Martin, 6 N. H. 25, 26; Rossiter v. Cossit, 15 N. H. 38, 43; Clough v. Elliott, 23 N. H. 182, 183; Woods v. Wallace, 30 N. H. 384, 388; Hartshorne, 2 N. J. Eq. 349, 359; Evertson v. Tappen, 5 Johns. Ch. 482, 493; Bell v. Mayor, 10 Paige, 49, 71; House, 10 Paige, 158, 164; Ross v. Boardman, 22 Hun, 527.

14 Gully v. Ray, 18 Mon. B. 107, 113; *ante*, § 256.

15 Miller v. Stump, 3 Gill, 304, 311; Glenn v. Clark, 53 Md. 580, 604; Rands v. Kendall, 15 Ohio, 671, 676; Pillow v. Thomas, 1 Baxt. 120.

16 McMahon v. Russell, 17 Fla. 638, 705; Denton v. Nanny, 8 Barb. 618, 621. See Smith v. Eustis, 7 Me. 41, 43; Manning v. Laboree, 33 Me. 343; Wilkins v. French, 20 Me. 111; Young v. Tarbell, 37 Me. 503, 515; Moore v. Rollins, 45 Me. 493, 495; Eaton v. Simonds, 14 Pick. 148, 104; Bolton v. Ballard, 13 Mass. 227; Wedge v. Moore, 6 Cush. 8; Draper v. Baker, 12 Cush. 288; Henry, 4 Cush. 257; Whitehead v. Middleton, 2 How. (Miss.) 632; Rossiter v. Cossit, 15 N. H. 38; Hastings v. Stevens, 29 N. H. 564; Bullard v. Bowers, 10 N. H. 500; Hinchman v. Stiles, 9 N. J. Eq. 361, 362; Titus v. Neilson, 5 Johns. Ch. 452, 457; Coates v. Cheever, 1 Cowen, 460, 478; Coles, 15 Johns. 319; 8 Am. Dec. 231; Wheeler v. Morris, 2 Bosw. 524, 526; Carter v. Goodin, 3 Ohio St. 75; Mathewson v. Smith, 1 R. I. 22, 27.

17 Bank v. Owens, 31 Md. 320, 325.

18 Collins v. Torry, 7 Johns. 278, 282; 5 Am. Dec. 273; Hitchcock v. Harrington, 6 Johns. 290, 295; 5 Am. Dec. 229; *ante*, § 260, n. 50.

19 *Eaton v. Simonds*, 14 Pick. 93, 107, 108; *Atkinson v. Stewart* 46 Mo. 510, 514; *Ketchum v. Shaw*, 23 Ohio St. 503, 506; 1 Wash. Real Prop. 186, § 21. But see 1 Scribner Dow. 535; *Barbour*, 46 Me. 9; *Newton v. Cook*, 4 Gray, 46; *Pyncheon v. Lester*, 6 Gray, 314.

20 *Eaton v. Simonds*, 14 Pick. 93, 107; *supra*, notes 11, 12.

21 *Cass v. Martin*, 6 N. H. 25; *Swaine v. Perine*, 5 Johns. Ch. 482, 491; 1 Scribner Dow. 532.

22 *Hitchcock v. Harrington*, 6 Johns. 290, 294; 5 Am. Dec. 229. See *Duval v. Febiger*, 1 Cinn. App. 263; *Denton v. Harris*, 2 Mason, 531, 539; *Popkin v. Bumpstead*, 8 Mass. 491; 5 Am. Dec. 113; *Thompson v. Boyd*, 22 N. J. L. 513; 21 N. J. L. 58; *Coates v. Cheever*, 1 Cowen, 463, 479; *Collins v. Torrey*, 7 Johns. 278; 5 Am. Dec. 273.

23 12 Law Rep. 165, 167; *Campbell v. Knights*, 24 Me. 332; 45 Am. Dec. 107; *Van Vronker v. Eastman*, 7 Met. 157; *Snyder*, 6 Mich. 470; *Woods v. Wallace*, 30 N. H. 384, 387; *James v. Morey*, 2 Cowen, 246, 285, 303; 14 Am. Dec. 475; *Van Duyne v. Thayer*, 19 Wend. 162, 171.

24 *Brown v. Lapham*, 3 Cush. 531, 557; *Woods v. Wallace*, 30 N. H. 384, 387; *Hartshorne*, 2 N. J. Eq. 349, 351. Regarded as assignee of mortgage: *Carll v. Butman*, 7 Me. 102; *McCable v. Swap*, 14 Allen, 183, 193; *Gibson v. Crehore*, 5 Pick. 146; *Russell v. Austin*, 1 Paige, 192.

25 *Carter v. Goodin*, 3 Ohio St. 75, 78. See *Hatch v. Palmer*, 58 Me. 271; *Brown v. Lapham*, 3 Cush. 551; *Bolton v. Ballard*, 13 Mass. 227; *Ketchum v. Shaw*, 23 Ohio St. 503.

26 *Eaton v. Simonds*, 14 Pick. 98, 104; *Swaine v. Perine*, 5 Johns. Ch. 482, 493.

27 *Bell v. Mayor*, 19 Paige, 49, 55.

28 *Dean v. Phillips*, 17 Ind. 406, 409; *Newhall v. Lynn*, 101 Mass. 423; 3 Am. Rep. 387; *Frost v. Peacock*, 4 Edw. Ch. 678, 695; *Titus v. Neilson*, 5 Johns. Ch. 452, 457; *Bell v. Mayor*, 19 Paige, 49, 55; *State v. Hinton*, 21 Ohio St. 509; *Folsom v. Rhodes*, 22 Ohio St. 435, 436.

29 *Wheeler v. Morris*, 2 Bosw. 524, 535; *Denton v. Nanny*, 8 Barb. 618, 622; *Mills v. Van Voorhies*, 20 N. Y. 412; *Ketchum v. Shaw*, 23 Ohio St. 503, 506. *Contra*, *Pritts v. Aldrich*, 11 Allen, 39, 40; *Reddick v. Walsh*, 15 Mo. 519, 538. See *Lamb v. Montague*, 112 Mass. 352, 353; *Davis v. Wetherell*, 13 Allen, 60, 63; *Robinson v. Shacklett*, 29 Gratt. 93, 107. See *post*, § 380.

30 *Vreeland v. Jacobus*, 19 N. J. Eq. 231, 232; *Denton v. Nanny*, 8 Barb. 618, 621; *Unger v. Leiter*, 32 Ohio St. 210.

31 *Smith v. Jackson*, 2 Edw. 28, 35; *infra*, n. 33.

32 *State v. Hinton*, 21 Ohio St. 509, 515. Husband must die before the sale: *Frost v. Peacock*, 4 Edw. 678, 695.

33 *Relff v. Horst*, 55 Md. 42, 47. S. P., *Cornog*, 3 Del. Ch. 407; *Harrow v. Johnson*, 3 Met. (Ky.) 578; *Jennison v. Hapgood*, 14 Pick. 345; 19 Am. Dec. 238; *Rutherford v. Nuince*, Walk. (Miss.) 370; *Tucker v. Field*, 51 Miss. 191; *Van Doren v. Dickerson*, 33 N. J. Eq. 388; *Hinchman v. Stiles*, 9 N. J. Eq. 454; *Matthews v. Duryea*, 45 Barb. 69; *Titus v. Neilson*, 5 Johns. Ch. 452; *Hawley v. Bradford*, 9 Paige, 201; 37 Am. Dec. 390; *Smith v. Jackson*, 2 Edw. Ch. 28; *Elmdorf v. Lockwood*, 57 N. Y. 322; *Fox v. Pratt*, 27 Ohio St. 512; *Culver v. Harper*, 27 Ohio St. 464; *State v. Hinton*, 21 Ohio St. 509, 515; *Baker v. Feters*, 16 Ohio St. 596; *Reed v. Morrison*, 12 Serg. & R. 18, 21; *Chaffee v. Franklin*, 11 R. I. 578; *Brown v. Duncan*, 4 McCord, 346; *Seith v. Trapier*, 1 Bail. Ch. 63; *Tibbetts v. Langley*, 12 S. C. 465; *Boyd v. Martin*, 9 Heisk. 332; *Hollis*, 4 Baxt. 524; *Boyer*, 1 Cold. 12; *Thompson v. Lyman*, 28 Wis. 266. See 111. R. S. 1830, p. 425, § 5; Ark. Dig. 1874, § 2215; Ky. R. S. 1879, p. 520, § 5.

34 *Hinchman v. Stiles*, 9 N. J. Eq. 361, 362; *Titus v. Neilson*, 5 Johns. Ch. 452, 457.

35 *Hinchman v. Stiles*, 9 N. J. Eq. 361, 362; *State v. Hinton*, 21 Ohio St. 509, 515; *supra*, n. 33.

36 *Nothingham*, 1 Cart. 527; *Robinson v. Shacklett*, 29 Gratt. 99. After foreclosure all rights in lands gone: *Chew v. Farmers*, 9 Gill, 361, 374; *Mantz v. Buchanan*, 1 Md. Ch. 202, 204; *Hartshorne*, 2 N. J. Eq. 349, 358; *Matthews v. Duryea*, 45 Barb. 63, 70; *Smith v. Jackson*, 2 Edw. 28, 35.

37 *Denton v. Nanny*, 8 Barb. 618, 622; *Mills v. Van Voorhies*, 20 N. Y. 412; 23 Barb. 125; *Bell v. Mayor*, 10 Paige, 49, 56; *Ross v. Boardman*, 22 Hun, 527, 528; *Ketchum v. Shaw*, 28 Ohio St. 503, 506.

§ 232. **Inchoate dower, incidents of.** — From the time of the marriage,<sup>1</sup> or of the vesting of the property if it was acquired after the marriage,<sup>2</sup> until the death of the husband at common law,<sup>3</sup> or of divorce, his insolvency, etc., under statutes,<sup>4</sup> dower is a mere inchoate right.<sup>5</sup> It is not vested;<sup>6</sup> the legislature may change it,<sup>7</sup> though not to enlarge it as against one who has purchased the land from the husband,<sup>8</sup> or to place it ahead of a prior encumbrance;<sup>9</sup> it has been called an expectancy or possibility,<sup>10</sup> more than a possibility, a contingent interest, not an interest in real estate,<sup>12</sup> not an estate,<sup>13</sup> a mere contingent right.<sup>14</sup> It is a wife's right to such part of her husband's lands as the law at the time of his death,<sup>15</sup> or of the alienation if he has aliened it,<sup>16</sup> may allow her. It is certainly a valuable right,<sup>17</sup> and has many of the incidents of property;<sup>18</sup> its probable present value can be computed,<sup>19</sup> though some cases say it has no present value;<sup>20</sup> it is a valuable consideration for a conveyance, etc., to the wife;<sup>21</sup> she may maintain an action for the protection of it,<sup>22</sup> for example, to set aside a deed made by the husband in fraud of her rights before<sup>23</sup> or after<sup>24</sup> marriage, or to recover damages against one who has secured her joinder in her husband's deed by fraud;<sup>25</sup> she may file a bill to redeem;<sup>26</sup> in some States, but not generally,<sup>27</sup> she must be a party to a suit affecting the land,<sup>28</sup> and in case of a foreclosure during coverture, the value of

her inchoate dower will be set aside for her out of the surplus.<sup>29</sup> Still inchoate dower cannot be bargained and sold,<sup>30</sup> but only released to the tenant;<sup>31</sup> and if the release reserves compensation for her, her right thereto will be recognized;<sup>32</sup> it cannot be taken in execution;<sup>33</sup> the Statute of Limitations does not run against it.<sup>34</sup> Though it has sometimes been questioned whether inchoate dower is an encumbrance,<sup>35</sup> that it is, is now settled;<sup>36</sup> it comes within the covenant against encumbrances,<sup>37</sup> and is such an encumbrance as would justify a vendee in refusing to perform his contract;<sup>38</sup> but its existence is not a breach of a covenant of seisin;<sup>39</sup> nor is there a breach of a covenant not to set up dower,<sup>40</sup> or for quiet enjoyment,<sup>41</sup> or of general warranty,<sup>42</sup> until dower has been claimed and set off; before assignment only nominal damages can be recovered in any case.<sup>43</sup> A suit may be maintained for quieting the title of land in which inchoate dower is claimed.<sup>44</sup>

1 Wait, 4 N. Y. 95, 99; *ante*, § 250.

2 Price v. Hobbs, 47 Md. 359, 381; *ante*, § 246.

3 Reiff v. Horst, 55 Md. 42, 47; *ante*, § 251.

4 Wright v. Gelvin, 85 Ind. 123; Roberts v. Shroyer, 68 Ind. 64; *ante*, §§ 247, 251.

5 Buzick, 45 Iowa, 259, 262; 24 Am. Rep. 740; cases cited *infra*.

6 Simon v. Canady, 53 N. Y. 298, 303; 3 Am. Rep. 523; *ante*, §§ 22, 248.

7 Thornbury, 18 W. Va. 522, 527; *ante*, §§ 22, 248.

8 Lucas v. Sawyer, 17 Iowa, 517, 521.

9 Helphinstine v. Meredith, 84 Ind. 1, 3.

10 Randall v. Kreiger, 23 Wall. 137, 148.

11 Bullard v. Briggs, 7 Pick. 533, 539; 19 Am. Dec. 292.

12 Simon v. Canady, 53 N. Y. 293, 303; 13 Am. Rep. 523; Moore v. Mayor, 8 N. Y. 110, 113; 59 Am. Dec. 473; *post*, § 263, n. 8.

13 State v. Wincroft, 76 N. C. 38, 39.

14 Johnson v. Van Dyke, 6 McLean, 422, 441.

15 Guerin v. Moore, 25 Minn. 462, 465.

16 See O'Ferrall's v. Simplot, 4 Iowa, 381; *ante*, § 243.

17 Bullard v. Briggs, 7 Pick. 533, 539; 19 Am. Dec. 292; Simon v. Canady, 53 N. Y. 298, 303; 13 Am. Rep. 523; Miller v. Crawford, 32 Gratt. 277.

18 Buzick, 44 Iowa, 259, 262; 24 Am. Rep. 740.



- 19 Buzick, 44 Iowa, 253, 262; Jackson v. Edwards, 7 Paige, 386, 408; 2 Scribner Dow. 6, n. 5.
- 20 Reiff v. Horst, 55 Md. 42, 49; Moore v. Mayor, 8 N. Y. 110, 113; 59 Am. Dec. 473.
- 21 Buzick, 44 Iowa, 259, 262; Bullard v. Briggs, 7 Pick. 533, 539; 19 Am. Dec. 292; Reiff v. Horst, 55 Md. 42, 49; *ante*, § 105.
- 22 Buzick, 44 Iowa, 253, 262.
- 23 Petty, 4 Mon. B. 215, 218; 39 Am. Dec. 501.
- 24 Buzick, 44 Iowa, 259, 264; Burns v. Lynde, 6 Allen, 305.
- 25 Simon v. Canady, 53 N. Y. 298, 303, 304; 13 Am. Rep. 523; Russell v. Taylor, 41 Mich. 702.
- 26 Davis v. Wetherell, 13 Allen, 60, 63; *ante*, § 261.
- 27 Pritts v. Aldrich, 11 Allen, 39, 40; *ante*, § 261; *post*, § 280.
- 28 Greiner v. Klein, 23 Mich. 12, 18; *ante*, § 261; *post*, § 280.
- 29 Vreeland v. Jacobus, 19 N. J. Eq. 231, 232; *ante*, § 261.
- 30 McKee v. Reynolds, 26 Iowa, 578, 584; Reiff v. Horst, 55 Md. 42, 47; Davis v. Wetherell, 13 Allen, 60, 62; Moore v. Mayor, 8 N. Y. 110, 113; 59 Am. Dec. 473; *post*, § 263.
- 31 Moore v. Mayor, 8 N. Y. 110, 113; 59 Am. Dec. 473; *post*, § 271.
- 32 Reiff v. Horst, 55 Md. 42, 49; Miller v. Crawford, 32 Gratt. 277.
- 33 Davis v. Wetherell, 13 Allen, 60, 62; *post*, § 263.
- 34 Davis v. Wetherell, 13 Allen, 60, 62; *post*, § 277.
- 35 Powell v. Monson, 3 Mass. 347, 355; Fuller v. Wright, 18 Pick. 405; Nyce v. Oberts, 17 Ohio, 71.
- 36 Blodget v. Brent, 3 Cranch C. C. 394, 396; Barnett v. Gaines, 8 Ala. 273, 274. S. P., Duvall v. Craig, 2 Wheat. 45; Parks v. Brooks, 16 Ala. 529; Shelton v. Carroll, 16 Ala. 148; Springler v. Shields, 17 Ala. 296; Vance v. Hooper, 11 Ala. 552; Beavers v. Smith, 11 Ala. 20; McLemore v. Mabson, 20 Ala. 137; Thrasher v. Pinkard, 34 Ala. 616; Smith v. Ackerman, 5 Blackf. 542; Whisler v. Hicks, 5 Blackf. 100; 33 Am. Dec. 454; Clark v. Richardson, 32 Iowa, 399; Porter v. Noyes, 2 Me. 26; 11 Am. Dec. 30; Post v. Campan, 42 Mich. 95; Bigelow v. Hubbard, 97 Mass. 195; Prescott v. Trueman, 4 Mass. 627; 3 Am. Dec. 246; Greenwood v. Lyon, 10 Smedes & M. 615; 43 Am. Dec. 775; Russ v. Perry, 49 N. H. 517; Pitts v. Hoitt, 17 N. H. 530; Carter v. Denman, 23 N. J. L. 260; Jones v. Gardiner, 10 Johns. 266; Hill v. Ressegieu, 17 Barb. 162; Stevens v. Hunt, 15 Barb. 17; Ketchum v. Evertson, 13 Johns. 359; 7 Am. Dec. 384; Litner v. Brough, 11 Pa. St. 137; Rank Cov. 109-111.
- 37 Shearer v. Ranger, 22 Pick. 447, 449; *supra*, n. 36.
- 38 Barnett v. Gaines, 8 Ala. 373, 374. S. P., Spinger v. Shields, 17 Ala. 296; Porter v. Noyes, 2 Me. 26; 11 Am. Dec. 30; Fuller v. Wright, 18 Pick. 405; Greenwood v. Lyon, 10 Smedes & M. 615; 43 Am. Dec. 775; Beardslee v. Underhill, 37 N. J. L. 310; Jones v. Gardiner, 10 Johns. 266; Bitner v. Brough, 11 Pa. St. 137. But see Nyce v. Oberts, 17 Ohio, 71, 75.
- 39 Lewis, 5 Rich. 12.
- 40 Hudson v. Steere, 9 R. I. 106, 109.
- 41 Lewis, 5 Rich. 12.
- 42 Leary v. Dunham, 4 Ga. 593; Wilson v. Taylor, 9 Ohio St. 595; Johnson v. Nyce, 17 Ohio, 66; 49 Am. Dec. 444; Tuite v. Miller, 5 West. L. J. 413.



43 *Runnels v. Webber*, 59 Me. 488; *Harrington v. Murphy*, 109 Mass. 299.

44 *Madigan v. Welsh*, 22 Wis. 501

§ 263. Consummate dower before assignment — Incidents of. — On the husband's death at common law,<sup>1</sup> or divorce, etc., under statutes,<sup>2</sup> dower is consummate.<sup>3</sup> It is a vested right,<sup>4</sup> which cannot be taken away.<sup>5</sup> In some States by construction of statutes, it is an estate in common with the heirs or alienee;<sup>6</sup> but at common law, before assignment and actual admeasurement, it is a mere right of action<sup>7</sup> growing out of land;<sup>8</sup> it is not an estate in land;<sup>9</sup> the widow is not seized and has no right of entry;<sup>10</sup> she cannot, except by the law of quarantine,<sup>11</sup> hold possession of any of the property;<sup>12</sup> she cannot enter as against the tenant,<sup>13</sup> or maintain a suit of ejectment,<sup>14</sup> or sue her husband's alienee for trespass;<sup>15</sup> she cannot defend against entry of heir;<sup>16</sup> she cannot proceed for partition;<sup>17</sup> and it is even questioned whether she need be a party to a suit respecting the land;<sup>18</sup> if she occupies the land she must account for all its fruits, etc.,<sup>19</sup> and for its rents and profits;<sup>20</sup> it is a mere right appendant to the land until it is severed by assignment.<sup>21</sup> It cannot be seized in execution,<sup>22</sup> though her creditors can in equity subject it to their claims;<sup>23</sup> in one case the court compelled her to transfer her right to a receiver, who then had dower assigned for the benefit of her creditors.<sup>24</sup> She cannot at law transfer it so as to give her alienee the right to sue in his own name<sup>25</sup> — her deed does not estop her;<sup>26</sup> but such suit may be maintained in her name for the benefit of her alienee,<sup>27</sup> and her transfers are recognized and enforced in equity.<sup>28</sup> Nor can she make a mortgage<sup>29</sup> or lease<sup>30</sup> of it. But she can release it to the tenant,<sup>31</sup> and can consent to an award in place of it.<sup>32</sup> It is an adverse claim against the property within a statute re-

speeting the quieting of titles.<sup>33</sup> Being *sui juris*, she may make any personal contract respecting her dower that she wishes.<sup>34</sup> Her main right is to have her dower assigned.<sup>35</sup>

1 Reiff v. Horst, 55 Md. 42, 47; *ante*, § 251.

2 Wright v. Gebin, 85 Ind. 128; *ante*, §§ 247, 251.

3 Price v. Hobbs, 47 Md. 357, 381; *cases infra*.

4 Thornbury, 18 W. Va. 522, 527; *ante*, § 22.

5 Burke v. Barron, 8 Iowa, 132.

6 See Greathhead, 42 Conn. 374; Stedman v. Fortune, 5 Conn. 462; Gomley v. Kmley, 76 Pa. St. 70; Davison, 95 Pa. St. 394; Grant v. Parham, 15 Vt. 640; Gorham v. Daniels, 23 Vt. 606; Terry v. Burnell 14 Fed. Rep. 807, 810.

7 Pennington v. Yell, 11 Ark. 212, 239; 52 Am. Dec. 262; Summers v. Babb, 13 Ill. 483, 484; Hilleary, 26 Md. 274, 289; Torry v. Minor, 1 Smedes & M. Ch. 489; Rayner v. Lee, 20 Mich. 384, 386; Hoxsie v. Ellis, 4 R. I. 123, 124; Weaver v. Sturtevant, 12 R. I. 537; Downs v. Allen, 10 Lea, 652, 668.

8 Bogardus v. Parker, 7 How. Pr. 303.

9 Blodget v. Brent, 3 Cranch C. C. 394, 396; Hilleary, 26 Md. 274, 289; Hoxsie v. Ellis, 4 R. I. 123, 124; Weaver v. Sturtevant, 12 R. I. 537, 539; Whyte v. Mayor, 2 Swan, 361, 367. S. P., Smith, 13 Ala. 329; Sharpley v. Jones, 5 Har. (Del.) 373; Hoots v. Graham, 23 Ill. 81; Reynolds v. McCurry, 100 Ill. 356; Taylor v. McCrackin, 2 Blackf. 260; Carey v. Buntin, 4 Bibb, 217; Johnson v. Shields, 32 Me. 424; Lobdell v. Hayes, 12 Gray, 236; Rayner v. Lee, 20 Mich. 384; McClanahan v. Porter, 10 Mo. 746; Waller v. Mardus, 29 Mo. 25; Johnson v. Morse, 2 N. H. 48; Bleecker v. Hennon, 23 N. J. Eq. 123; Wade v. Miller, 32 N. J. L. 296; Branson v. Yancy, 1 Dev. Eq. 77; Scott v. Howard, 3 Barb. 319; Jones v. Hollopeter, 10 Serg. & R. 326; Weaver v. Sturtevant, 12 R. I. 537; Lamar v. Scott, 4 Rich. 516; Guthrie v. Owen, 10 Yerg. 339; Chapman v. Armistead, 4 Munf. 382; Farnsworth v. Cole, 42 Wis. 403.

10 Hilleary, 26 Md. 274, 289; Downs v. Allen, 10 Lea, 652, 668.

11 Fully discussed Stewart M. & D. § 459.

12 Hildreth v. Thompson, 16 Mass. 191; *supra*, n. 9.

13 Sheafe v. O'Neil, 9 Mass. 13.

14 Doe v. Smith, 2 Car. & P. 430; 12 Eng. C. L. 205; Coles, 15 Johns. 319; 8 Am. Dec. 231; Bradshaw v. Callaghan, 5 Johns. 80; 8 Johns. 435.

15 Tuttle v. Burlington, 49 Iowa, 134, 135.

16 Hildreth v. Thompson, 16 Mass. 191; Evans v. Webb, 1 Yeates, 424; 50 Am. Dec. 308.

17 Reynolds v. McCurry, 100 Ill. 356; Coles, 15 Johns. 319; 8 Am. Dec. 231; Thorn v. Adams, 2 Whart. 188.

18 Blodget v. Brent, 3 Cranch C. C. 394, 396. See Cavender v. Smith, 8 Iowa, 360; Stewart v. Chadwick, 8 Iowa, 463; Postlewaite v. Howe, 3 Iowa, 365; Moody v. Seaman, 46 Mich. 74; Proctor v. Bigelow, 38 Mich. 282; McClurg v. Turner, 74 Mo. 45; Miller v. Talley, 48 Mo. 503; Haulenbeck v. Cronkright, 23 N. J. Eq. 407; Tanner v. Wiles, 1 Barb. 560, 564; Bradshaw v. Callaghan, 5 Johns. 80; 8 Johns. 435; Pringle v. Gaw, 5 Serg. & R. 536; Hoxsie v. Ellis, 4 R. I. 123, 124; *post*, § 280.

19 *Budd v. Hiller*, 27 N. J. L. 43; *Kain v. Fisher*, 6 N. Y. 597; *Webb v. Boyle*, 63 N. C. 271, 275.

20 *Grimes v. Wilson*, 4 Blackf. 331.

21 *Summers v. Babb*, 13 Ill. 483, 484.

22 *Pennlington v. Yell*, 11 Ark. 212, 239; 52 Am. Dec. 262; *Summers v. Babb*, 13 Ill. 483, 484; *Gorch v. Atkins*, 11 Mass. 378; *Moore v. Mayor*, 8 N. Y. 110, 113; 59 Am. Dec. 473; *Sutliff v. Forgey*, 1 Cowen, 89, 96; S. P., *Wallace v. Hall*, 19 Ala. 367; *Newman v. Willetts*, 48 Ill. 534; *Hoots v. Graham*, 23 Ill. 81; *Blair v. Harrison*, 11 Ill. 384; *Rausch v. Moore*, 48 Iowa, 611; 30 Am. Rep. 412; *Carey v. Bunthin*, 4 Bibb, 217; *Petty v. Malin*, 15 Mon. B. 591; *Vasar v. Allen*, 5 Me. 477; *Wallis v. Smith*, 1 Smedes & M. 220; *Torrey v. Minor*, 1 Smedes & M. Ch. 489; *Waller v. Mardus*, 29 Mo. 53; *Johnson v. Morse*, 2 N. H. 48; *Jackson v. Aspell*, 20 Johns. 411; *Webb v. Boyle*, 63 N. C. 271, 275; *Garretson v. Brien*, 3 Heisk. 534.

23 *Davison v. Whittlesey*, 1 McAr. 163; *Stewart v. McMartin*, 5 Barb. 433; *Tompkins v. Fonda*, 4 Paige, 448; *Payne v. Becker*, 87 N. Y. 153, 157.

24 *Payne v. Becker*, 87 N. Y. 153, 157.

25 *Weaver v. Sturtevant*, 12 R. I. 537, 540. S. P., *Terry v. Burnell*, 14 Fed. Rep. 807, 810; *Nelson v. Holly*, 50 Ala. 3; *Saltmarsh v. Smith*, 32 Ala. 404; *Wallace v. Hall*, 19 Ala. 367; *Reed v. Ash*, 30 Ark. 775; *Jacks v. Dyer*, 31 Ark. 334; *Carmall v. Wilson*, 21 Ark. 62; *Hoots v. Graham*, 23 Ill. 81; *Summers v. Babb*, 13 Ill. 483, 484; *Metlock v. Lee*, 9 Ind. 298; *Strong v. Bragg*, 7 Blackf. 62; *Houston v. Seeley*, 27 Iowa, 183; *Tucker v. Vance*, 2 Marsh. A. K. 458; *Johnson v. Shields*, 32 Me. 424; *Rowe v. Johnson*, 19 Me. 146; *Hildreth v. Thompson*, 16 Mass. 191; *Leavitt v. Lamprey*, 13 Pick. 382; 23 Am. Dec. 685; *Jones v. Manby*, 58 Mo. 559; *Jackson v. Aspell*, 20 Johns. 411; *Sutliff v. Forgey*, 1 Cowen, 89, 96; *Jackson v. Vanderheyden*, 17 Johns. 167; 8 Am. Dec. 378; *Cox v. Jagger*, 2 Cowen, 638; 19 Am. Dec. 522; *Douglass v. McCoy*, 5 Ohio, 522; *Miller v. Woodman*, 14 Ohio, 518; *Lamar v. Scott*, 4 Rich. 516. But see *supra*, n. 6.

26 *Weaver v. Sturtevant*, 12 R. I. 537, 540.

27 *Robie v. Flanders*, 33 N. H. 524. S. P., *Powell*, 10 Ala. 900; *Hunt v. Acre*, 28 Ala. 580; *Rowe v. Johnson*, 19 Me. 146; *Thomas v. Simpson*, 3 Pa. St. 60, 71; *Lamar v. Scott*, 4 Rich. 516.

28 *Tompkins v. Fonda*, 4 Paige, 448. S. P., *Brown v. Meredeth*, 2 Keen, 527; *Strong v. Clem*, 12 Ind. 37; *Strong v. Bragg*, 7 Blackf. 62; *Maccubbin v. Cromwell*, 2 Har. & G. 443; *Torrey v. Minor*, 1 Smedes & M. Ch. 489; *Porter v. Everett*, 7 Ired. Eq. 152; *Wilson v. McLoughan*, 1 McMull. Eq. 35. *Contra*, *Saltmarsh v. Smith*, 32 Ala. 404; *Blair v. Harrison*, 11 Ill. 384.

29 *Strong v. Bragg*, 7 Blackf. 62.

30 *Foster v. Gorton*, 5 Pick. 185. S. P., *Blair v. Harrison*, 11 Ill. 384; *Cronde v. Ingraham*, 13 Pick. 33; *Hildreth v. Thompson*, 16 Mass. 191.

31 *Meek v. Chamberlain*, 8 Law R. Q. B. D. 31, 34; *Mattock v. Lee*, 9 Ind. 298; *Summers v. Babb*, 13 Ill. 483, 484; *Weaver v. Sturtevant*, 12 R. I. 537, 540; *post*, § 271.

32 *Furber v. Chamberlain*, 28 N. H. 405; *Cox v. Jagger*, 2 Cowen, 638; *Shotwell v. Sedam*, 3 Ohio, 5.

33 *Benoist v. Murrin*, 47 Mo. 537.

34 Consult cases *supra*, notes 31, 32.

35 *Post*, §§ 283-300.

§ 264. *Assigned dower—Incidents of.*—After assignment of dower and entry by the widow, she is seized of a freehold for her life;<sup>1</sup> her estate is a continuation of her husband's,<sup>2</sup> and relates back to the time of his death,<sup>3</sup> unless the assignment has been against common right,<sup>4</sup> in which case her estate begins from the time of the assignment.<sup>5</sup> Her estate has most of the incidents of a conventional life estate;<sup>6</sup> she must pay taxes<sup>7</sup> and charges<sup>8</sup> of every kind thereupon; she is entitled to reasonable estovers;<sup>9</sup> she has the right to the crops growing on the property<sup>10</sup> at the time of the assignment;<sup>11</sup> her representatives are entitled to all crops sown by her,<sup>12</sup> and to arrears of rent due at the time of her death on a lease made by her;<sup>13</sup> she holds the property subject to such liens as are paramount to her dower,<sup>14</sup> but free from all others;<sup>15</sup> she may alien the estate,<sup>16</sup> and it may be seized for her debts;<sup>17</sup> on her death the estate ceases,<sup>18</sup> as does a right of way given her therewith;<sup>19</sup> and her representatives cannot claim betterments put on the property by her.<sup>20</sup> Her possession is not adverse to the reversioner;<sup>21</sup> there is no privity of estate between them;<sup>22</sup> a remainder cannot be limited after her dower;<sup>23</sup> she may make any contract she pleases with the reversioner,<sup>24</sup> but the assignment of dower is not a consideration therefor.<sup>25</sup> In various ways she may forfeit her dower,<sup>26</sup> as by waste;<sup>27</sup> but the strict common law as to waste is not generally enforced in the United States,<sup>28</sup> and she may make any reasonable use of the property.<sup>29</sup>

1 *Whyte v. Mayor*, 2 Swan, 364, 367; *Summers v. Babb*, 13 Ill. 483, 484.

2 *Moore v. Mayor*, 8 N. Y. 110, 113; 59 Am. Dec. 473. S. P., *Stevens*, 3 Dana, 371; *Baker*, 4 Me. 67; *Childs v. Smith*, 1 Md. Ch. 483; *Windham v. Portland*, 4 Mass. 384; *Norwood v. Morrow*, 4 Dev. & B. 442, 448.

3 *Norwood v. Morrow*, 4 Dev. & B. 442, 448; *supra*, n. 2.

4 Discussed *post*, § 285.

5 2 Scribner Dow. 776.

- 6 Whyte v. Mayor, 2 Swan, 364, 367.
- 7 Graham v. Dunigan, 2 Bosw. 516. S. P., Varney v. Stevens, 22 Me. 331, 334; Stetson v. Day, 51 Me. 434; Cains v. Chabert, 3 Edw. Ch. 312; Bidwell v. Greenshield, 2 Abb. N. C. 427; Whyte v. Mayor, 2 Swan, 364, 367; Durkee v. Felton, 44 Wis. 467.
- 8 Peyton v. Jeffries, 50 Ill. 143; Paving assessment: Whyte v. Mayor, 2 Swan, 264, 367. Repairs: Haulenback v. Cronkright, 23 N. J. Eq. 407.
- 9 White v. Cutler, 17 Pick. 248.
- 10 Kain v. Fisher, 6 N. Y. 597, 598. S. P., Street v. Saunders, 27 Ark. 554; Talbot v. Hill, 68 Ill. 106; Ralston, 3 G. Greene, 533; Parker, 17 Pick. 236.
- 11 Budd v. Hiler, 27 N. J. L. 43.
- 12 2 Scribner Dow. 780.
- 13 Stockwell v. Sargent, 37 Vt. 16.
- 14 2 Scribner Dow. 775; *ante*, § 258.
- 15 2 Scribner Dow. 775; *ante*, § 258.
- 16 Summers v. Babb, 13 Ill. 483, 484; Windham v. Portland, 4 Mass. 384, 388. S. P., Matlock v. Lee, 9 Ind. 298; Stevens, 3 Dana, 371; Child v. Smith, 1 Md. Ch. 483; Norwood v. Morrow, 4 Dev. & B. 442. Consult *ante*, § 263.
- 17 Summers v. Babb, 13 Ill. 483, 484; *supra*, n. 16.
- 18 Holmes v. McGee, 20 Miss. 411; Stockwell v. Sargent, 37 Vt. 16.
- 19 Hoffman v. Savage, 15 Mass. 130.
- 20 Maddison v. Jellison, 11 Me. 482; Bent v. Weeds, 44 Me. 45; Wiltse v. Hurley, 11 Ohio, 473; Cannon v. Hare, 1 Tenn. Ch. 22.
- 21 Chairs v. Hobson, 10 Humph. 354.
- 22 Adams v. Butts, 9 Conn. 79.
- 23 Park Dow. 340, 341; 2 Scribner Dow. 773.
- 24 Page, 20 N. H. 128.
- 25 Perkins, § 272; Park Dow. 341; 2 Scribner Dow. 773.
- 26 Discussed, 2 Scribner Dow. 795.
- 27 By statute in Delaware, Illinois, Kentucky, Maine, Minnesota, Missouri, New Jersey, New York, North Carolina, Ohio, and Rhode Island, she forfeits dower for waste; in Maryland, Michigan, New Hampshire, Oregon, South Carolina, Virginia, Vermont, and Wisconsin, she is liable on damages therefor: 2 Scribner Dow. 800, 801.
- 28 Allen v. McCoy, 8 Ohio, 418.
- 29 Joyner v. Speed, 68 N. C. 236.

ARTICLE II.—BARRING AND DEFEATING OF DOWER.

- § 265. Generally, various modes of.
- § 266. Antenuptial settlement or agreement.
- § 267. Postnuptial settlement or agreement.
- § 268. Act of husband before and during coverture.
- § 269. Act of wife during coverture.
- § 270. Release of dower, generally.
- § 271. Release of dower, parties, consideration.
- § 272. Release of dower, effect of.
- § 273. Jointure, legal and equitable.
- § 274. Devise in lieu of dower.
- § 275. Widow's election.
- § 276. Estoppel.
- § 277. Limitations and laches.
- § 278. Dedication to public uses.
- § 279. Termination of husband's estate, etc.
- § 280. Legal proceedings.
- § 281. Divorce.
- § 282. Bankruptcy of husband.

§ 265. The various ways in which dower may be prevented or defeated.—A widow may have no right to dower either because the right never attached, or because after attaching it was destroyed; the right may be prevented or defeated. Though it is extremely difficult to lay down any general rule which might not mislead, the following statement is substantially correct: The husband may avoid the inconvenience of dower, by taking such a title in himself that the requisites of dower will not exist, or by before marriage changing his tenure for the same purpose, but this must not be done secretly or it will be a fraud on the wife; so he may prevent dower by making a settlement before marriage in accordance with the statute of uses or similar acts, by legal jointure. After marriage and acquisition of his property, he can in most States do nothing to relieve it of dower without his wife's consent, but he can make a provision for her by deed or

will in lieu of dower—an equitable jointure—by the acceptance of which after his death she will be barred of dower. The wife may prevent dower by covenanting before marriage never to claim it; during coverture she may release it by complying with the statute; and after her husband's death, she may bar herself by any agreement she may make, or by accepting any provision in its stead, or by any conduct which would make it inequitable to claim it, or by her laches or delay. So dower may be defeated by operation of law, as when the husband's estate terminates, or is converted into personalty by legal proceedings during coverture, or when the realty is taken during coverture by right of eminent domain, or when the husband and wife are absolutely divorced. These different modes of barring and defeating dower are discussed in the following sections.

§ 266. Antenuptial settlement or agreement as a bar to dower.—By the common law no provision or settlement made by a man before his marriage in favor of his future wife, could bar dower,<sup>1</sup> because dower being a freehold estate, by a maxim of the common law, could not be barred by a collateral satisfaction;<sup>2</sup> but the statute of uses provided that a settlement of a certain kind—a *legal jointure*—made before marriage should bar dower,<sup>3</sup> even without the wife's consent;<sup>4</sup> this statute was adopted in the United States as a part of the common law,<sup>5</sup> and somewhat similar statutes have been passed in many of the United States.<sup>6</sup> By the common law, also, no contract between the husband and wife before marriage could bar dower,<sup>7</sup> because, first, an agreement was merged by the marriage of the contracting parties,<sup>8</sup> and second, an agreement to release a right not yet existing was void.<sup>9</sup> And even

now, except under the express provisions of some statute, no settlement or agreement between husband and wife before marriage is a bar to dower at law.<sup>10</sup> But equity, from analogy to the statute of uses, at an early date compelled a widow to elect between her dower and *any* provision made for her before marriage expressly in lieu of dower, and held her barred of her dower by the acceptance of any such provision.<sup>11</sup> And in courts of equity a marriage contract was held an exception to the rule that the marriage of the contracting parties merges the contract,<sup>12</sup> and a wife's covenant not to claim dower—marriage itself being a sufficient consideration therefor<sup>13</sup>—has always been enforced.<sup>14</sup> Of an adult woman's power in equity to absolutely bar herself of dower, there is no doubt whatever, says Lord St. Leonards;<sup>15</sup> if she acts with her eyes open she may take even a chance in lieu of dower;<sup>16</sup> she is *sui juris*, and there is no reason why her covenant should not be enforced;<sup>17</sup> and so it is settled that, by an agreement before marriage, husband and wife may vary or wholly waive their rights in each other's property.<sup>18</sup> Still, if it is stipulated that the wife shall receive a certain provision in lieu of her dower, and this stipulation is not carried out, she is released from her contract;<sup>19</sup> but if she accepts some other provision after her husband's death, in lieu of the one which has failed, she is barred.<sup>20</sup> An antenuptial settlement is of course invalidated by fraud, and a husband is required to be particularly open in making such a contract with his wife.<sup>21</sup> A contract expressly referring to dower has no effect on the wife's thirds.<sup>22</sup>

1 Vincent v. Spooner, 2 Cush. 467, 473.

2 Hastings v. Dickinson, 7 Mass. 153, 155; 5 Am. Dec. 34. S. P., Vernon, 4 Rep. 1, 4; O'Brien v. Elliott, 15 Me. 125, 127; 32 Am. Dec. 137; Logan v. Phillips, 18 Mo. 22, 23; Jones v. Powell, 6 Johns. Ch. 196, 200; Murphy, 12 Ohio St. 407, 409.

3 Co. Litt. 36 b; Vernon, 4 Rep. 1, 3 a; 27 Henry VIII., ch. 10, § 9.



4 1 Greenl. Cruise, 199, § 37; 1 Wash. Real Prop. p. 263; 2 Scribner Dow. 405; *post*, § 273.

5 Alex. Brit. Stat. in force, pp. 301, 302.

6 See Ark. Dig. 1874, §§ 2218-2220; Ill. R. S. 1880, p. 426, §§ 7-11; Mo. R. S. 1879, § 2202.

7 Gibson, 15 Mass. 106, 110; 8 Am. Dec. 94; Logan v. Phillips, 18 Mo. 22, 25; Murphy, 12 Ohio St. 407, 403, 416.

8 See Long v. Kinney, 49 Ind. 235, 238; Smiley, 18 Ohio St. 543, 544; *ante*, § 44.

9 Hastings v. Dickinson, 7 Mass. 153, 155; 5 Am. Dec. 34; Logan v. Phillips, 18 Mo. 22, 25; Murphy, 12 Ohio St. 407, 409, 416.

10 Martin, 22 Ala. 86, 104; Andrews, 8 Conn. 79, 84; Cauley v. Lawson, 5 Jones Eq. 132, 134; Murphy v. Avery, 1 Dev. & B. 25; Murphy, 12 Ohio St. 407, 411, 417; Gelzer, 1 Bail. Eq. 387, 388.

11 Logan v. Phillips, 18 Mo. 22, 26. S. P., Andrews, 8 Conn. 79, 85; McGee, 91 Ill. 548, 551; Jordan v. Clark, 81 Ill. 465, 466; Hastings v. Dickinson, 7 Mass. 153, 155; 5 Am. Dec. 34; *post*, §§ 273, 274, 276.

12 Miller v. Goodwin, 8 Gray, 512, 544; Crane v. Gough, 4 Md. 311, 331; McCampbell, 2 Lea, 661, 664; *ante*, § 44.

13 Wentworth, 69 Me. 247, 253; Stewart M. & D. § 33.

14 Dyke v. Rendall, 2 DeGex, M. & G. 209, 216, 218, 219; Andrews, 8 Conn. 79, 84; Culbertson, 37 Ga. 296, 299; McGee, 91 Ill. 548, 551; Jordan v. Clark, 81 Ill. 465, 466; Wentworth, 69 Me. 247, 252; Nail v. Maurer, 25 Md. 532, 539; Busey v. McCurley, 61 Md. 436, 443; Freeland, 128 Mass. 509, 510; Jenkins v. Holt, 109 Mass. 261; Miller v. Goodwin, 8 Gray, 542, 544; Vincent v. Spooner, 2 Cush. 467, 473; Logan v. Phillips, 18 Mo. 22, 23; Heald, 22 N. H. 265; Camden v. Jones, 23 N. J. Eq. 171, 173; Cauley v. Lawson, 5 Jones Eq. 132, 134; Murphy, 12 Ohio St. 407, 417; Bowen, 32 Ohio St. 164, 180; Mintier, 28 Ohio St. 307, 312, 315; Gelzer, 1 Bail. Eq. 387, 388; Findley, 11 Gratt. 434, 437; Charles, 8 Gratt. 486; 56 Am. Dec. 155; Faulkner, 3 Leigh, 255; 23 Am. Dec. 264; Stewart M. & D. §§ 32-43.

15 Dyke v. Rendall, 2 DeGex, M. & G. 209, 216; 13 Eng. L. & Eq. 404.

16 Caruthers, 4 Bro. C. C. 500; Dyke v. Rendall, 2 DeGex, M. & G. 209, 218.

17 Logan v. Phillips, 18 Mo. 22, 23.

18 Wentworth, 69 Me. 247, 252; Nail v. Maurer, 25 Md. 532, 539; Findley, 11 Gratt. 434, 437; Stewart M. & D. §§ 32-43.

19 Freeland, 128 Mass. 509, 511; Gibson, 15 Mass. 106, 112; 8 Am. Dec. 94; Camden v. Jones, 23 N. J. Eq. 171, 173.

20 Camden v. Jones, 23 N. J. Eq. 171, 173; *post*, § 276.

21 Freeland, 128 Mass. 509, 510; Bierer, 92 Pa. St. 265; Stewart M. & D. § 38; *ante*, § 110.

22 Findley, 11 Gratt. 434, 438.

§ 267. **Postnuptial settlement or agreement as a bar to dower.**—Any agreement between husband and wife was at common law void,<sup>1</sup> because husband and wife were one,<sup>2</sup> and because a wife could not contract at all;<sup>3</sup> and though the fiction of the unity of husband never had

a footing in equity,<sup>4</sup> and has been much modified by modern statutes at law,<sup>5</sup> and therefore a wife can by a contract with reference to her statutory<sup>6</sup> or equitable<sup>7</sup> estate bind such estate at all events in equity, her capacity to contract generally must be expressly given;<sup>8</sup> and as dower is neither equitable<sup>9</sup> nor statutory<sup>10</sup> separate estate, but a right *sui generis* arising by operation of law,<sup>11</sup> she can make no contract with reference to it except under the provisions of a statute giving her the power to contract in all cases or expressly referring to it.<sup>12</sup> Statutes have been passed in all those States where a husband cannot defeat dower by his separate deed,<sup>13</sup> authorizing married women to release their dower in a prescribed way;<sup>14</sup> these statutes must be strictly complied with,<sup>15</sup> and a release not valid at law is not valid in equity.<sup>16</sup> Equity will not even correct a deed as to the wife,<sup>17</sup> and certainly will not enforce a defective release as a contract to convey.<sup>18</sup> When the question arises as to the validity of a release to the husband under one of these statutes which authorizes releases generally, it must be remembered that in dealing with her husband a wife is said to be under a double incapacity, that of wife and that of married woman,<sup>19</sup> and that it is fairly settled that under a statute authorizing a married woman to contract generally, she cannot contract with her husband;<sup>20</sup> accordingly, it has been held, that a release of dower under a statute directly to the husband is void,<sup>21</sup> especially where the statute requires her to join with her husband;<sup>22</sup> and that even when she is authorized to contract, any agreement between them for the release of dower is void.<sup>23</sup> And this is true though the release was commanded by a court of equity.<sup>24</sup> A contrary decision in Iowa stands by itself.<sup>25</sup> But, granting the capacity of husband and wife to contract with each other during

coverture, there seems to be nothing in the nature of dower to except it from the rule that to avoid circuity of action an existing right may be equitably barred by an agreement never to claim it;<sup>26</sup> such a covenant should be enforced just as an antenuptial covenant is.<sup>27</sup> Under the statute of uses, a settlement made on a married woman during coverture in lieu of dower puts her to an election,<sup>28</sup> and it is settled in equity that a widow cannot take both a provision in lieu of dower and dower itself.<sup>29</sup> (This is true as to devises in lieu of dower nearly everywhere by statute.<sup>30</sup>) So that, while by a mere settlement on his wife not expressly in lieu of dower or clearly inconsistent therewith a husband does not affect her right to dower at all,<sup>31</sup> if by agreement with him she accepts a provision in lieu of dower and after his death retains or receives it, she ratifies her contract and is barred.<sup>32</sup> But if she has spent or wasted the provision before his death, she may have her dower without making any return.<sup>33</sup> It is necessary in order to estop her, that she should enjoy the consideration of her agreement in part at least after his death.<sup>34</sup> This question has arisen several times in regard to deeds of separation.<sup>35</sup>

1 Barron, 24 Vt. 375, 398; *ante*, § 41.

2 Scarborough v. Watkins, 9 Mon. B. 540, 545; 50 Am. Dec. 523; *ante*, § 41.

3 White v. Wager, 25 N. Y. 328, 332, 333; *post*, § 357.

4 Morrison v. Thistle, 67 Mo. 596, 600; Albin v. Lord, 39 N. H. 196, 204; *ante*, § 42.

5 Cole v. Van Riper, 44 Ill. 56, 63; *ante*, §§ 217-243.

6 See Wicks v. Mitchell 9 Kan. 80, 87; Radford v. Carwile, 13 W. Va. 573, 661; Krouskop v. Shontz, 51 Wis. 204, 214; *ante*, §§ 237, 238.

7 Yale v. Dederer, 22 N. Y. 451, 459; 68 N. Y. 329; *ante*, §§ 296, 297.

8 Albin v. Lord, 39 N. H. 196, 202; Ballin v. Dillaye, 37 N. Y. 35, 39; *post*, §§ 369-376.

9 Because such estate is always created by contract: Morrison v. Thistle, 67 Mo. 596, 599.

10 Bressler v. Kent, 61 Ill. 426, 428; 14 Am. Rep. 67; McCormick v. Hunter, 50 Ind. 186, 188; Ulp v. Campbell, 19 Pa. St. 361, 363; Townsend v. Brown, 16 S. C. 91.

- 11 Martin, 22 Ala. 86, 105; *ante*, §§ 262, 263.
- 12 Martin, 22 Ala. 86, 105. S. P., Stidham v. Matthews, 29 Ark. 650, 657, 658; Davis v. McDonald, 42 Ga. 205, 207; Lathrop v. Foster, 51 Me. 367, 369; Davis, 61 Me. 395, 399; Grove v. Todd, 41 Md. 633, 639; 20 Am. Rep. 76; Keeler v. Tatnell, 23 N. J. L. 62; White, 16 N. J. L. 202, 214; Conover v. Porter, 14 Ohio St. 450, 454; *post*, § 270.
- 13 See 1 Scribner Dow. ch. 29; *post*, § 268.
- 14 These statutes differ greatly: *Post*, §§ 270-272.
- 15 Grove v. Todd, 41 Md. 633, 639; 20 Am. Rep. 76; *supra*, n. 12.
- 16 Stidham v. Matthews, 29 Ark. 650, 657, 658; *post*, §§ 270, 271, 404.
- 17 Wiswall v. Hall, 3 Paige, 313, 317; Carr v. Williams, 10 Ohio, 305, 310; 26 Am. Dec. 87; Davenport v. Sovil, 6 Ohio St. 459, 466; *post*, § 272.
- 18 Stidham v. Matthews, 29 Ark. 650, 658; Atwater v. Buckingham, 5 Day, 492, 497, *ante*, §§ 170, 171; *post*, § 407.
- 19 White v. Wager, 25 N. Y. 323, 332-334; *ante*, § 43.
- 20 Haker v. Boggs, 63 Ill. 161, 163; Whitney v. Closson, Mass. Nov. 1884, 1 Daily Law Rec. No. 31; Knowles v. Hull, 99 Mass. 562, 564, 565; Lord v. Parker, 3 Allen, 127, 129; Aultman v. Obermeyer, 6 Neb. 260, 264; Savage v. O'Neill, 42 Barb. 374, 379; White v. Wager, 25 N. Y. 323, 330-334. *Contra*, Bank v. Banks, 101 U. S. 240, 244, 245; Kinkead, 3 Biss. 405, 410; Wells v. Gaywood, 3 Colo. 487, 494; Hamilton, 89 Ill. 349, 351; Robertson, 25 Iowa, 350, 355; Allen v. Hooper, 50 Me. 371, 374, 375; Jenne v. Marble, 37 Mich. 319, 321, 323; Ransom, 30 Mich. 328, 330; Rankin v. West, 25 Mich. 195, 200; Burdeno v. Amperse, 14 Mich. 91, 97; Albin v. Lord, 39 N. H. 196, 203, 204; Zimmerman v. Erhard, 53 How. Pr. 11, 13; Woodworth v. Sweet, 51 N. Y. 81; *ante*, § 43.
- 21 Rowe v. Hamilton, 3 Me. 63, 67; Carson v. Murray, 3 Paige, 483, 503; Crain v. Cavana, 36 Barb. 410, 412, 413; Graham v. Van Wyck, 14 Barb. 531, 532; *infra*, n. 22.
- 22 Markling, 30 Ark. 17, 24; Pillow v. Wade, 31 Ark. 678, 681; Rowe v. Hamilton, 3 Me. 63, 65; Carson v. Murray, 3 Paige, 483, 503; Mallory v. Horan, 12 Abb. Pr. N. S. 289, 295.
- 23 Whitney v. Closson, S. T. C. Mass. Nov. 8, 1884, 1 Daily Law Rec. No. 31. See Martin, 22 Ala. 86, 104; Pillow v. Wade, 31 Ark. 678, 681; Markling, 30 Ark. 17, 24; Rowe v. Hamilton, 3 Me. 63, 67; Shaw v. Reese, 14 Me. 432, 436; Graham v. Van Wyck, 14 Barb. 531, 532; Crain v. Cavana, 36 Barb. 410, 412; Townsend, 2 Sand. 711, 713, 714; Mallory v. Horan, 12 Abb. Pr. N. S. 289, 295; Carson v. Murray, 3 Paige, 483, 503; Walsh v. Kelly, 34 Pa. St. 84, 85; Evans, 3 Yeates, 507, 508; *post*, § 270.
- 24 Crain v. Cavana, 36 Barb. 410, 413.
- 25 Blake, 7 Iowa, 46, 54. See Lake v. Gray, 30 Iowa, 415, 419.
- 26 Hastings v. Dickinson, 7 Mass. 153, 155; 5 Am. Dec. 34.
- 27 See *ante*, § 266.
- 28 27 Henry VIII. ch. 10, § 9; Co. Litt. 36 b.
- 29 Jones v. Powell, 6 Johns. Ch. 194, 200; *post*, §§ 273-276.
- 30 Jennings, 21 Ohio St. 56, 76; *post*, § 274.
- 31 Mitchell, 8 Ala. 414, 424; Mitchell v. Wood, 60 Ga. 525, 531; O'Brien v. Elliott, 15 Me. 125, 127; 32 Am. Dec. 137; Swaine v. Perine, 5 Johns. Ch. 482, 490; 9 Am. Dec. 318.
- 32 Martin, 22 Ala. 86, 104; Lively v. Paschal, 35 Ga. 218, 223; Stoddard v. Cutcompt, 41 Iowa, 329, 333; Day v. West, 2 Edw. Ch. 532, 534;

Crain *v.* Cavana, 36 Barb. 410, 413; Townsend, 2 Sand. 711, 713, 714; Evans, 3 Yeates, 507, 503; Parham, 6 Humph. 287, 297.

33 Crain *v.* Cavana, 36 Barb. 410, 413; Carson *v.* Murray, 3 Paige, 433, 503.

34 Townsend, 2 Sand. 711, 713, 714; *supra*, n. 32; *post*, §§ 402, 420.

35 Carson *v.* Murray, 3 Paige, 433, 503; Day *v.* West, 2 Edw. Ch. 592, 594; Evans, 3 Yeates, 507, 503; Parham, 6 Humph. 287, 297; Burdick *v.* Briggs, 11 Wis. 126, 132.

§ 238. Act of husband before or after marriage barring or defeating dower.—Seisin of the husband during coverture is one of the requisites of dower,<sup>1</sup> so the wife has no dower in lands aliened by him before their marriage;<sup>2</sup> and any encumbrances placed by him on the property before marriage are superior to dower,<sup>3</sup> though he was an infant.<sup>4</sup> And the wife is barred though the conveyance is not executed<sup>5</sup> or recorded<sup>6</sup> at the time of the marriage, and though it is fraudulent as to creditors if not set aside during coverture;<sup>7</sup> and his agreement to convey is paramount to dower.<sup>8</sup> A deed made,<sup>9</sup> or a judgment confessed,<sup>10</sup> on the day of the marriage, is, unless proved to have been made or entered before the marriage, deemed inferior to dower. A legal jointure by the husband bars dower.<sup>11</sup> There are various devices by which a husband without materially affecting his enjoyment of his property could at common law prevent his wife's dower from attaching: thus, he could convey the legal title, there being no dower in equitable estates;<sup>12</sup> or change a fee into a long leasehold;<sup>13</sup> or convey the property indirectly to himself for life with power to deed or will.<sup>14</sup> But all such antenuptial acts of his must, in order to affect dower, have been known to his intended wife; a secret disposition of his property is a fraud on her.<sup>15</sup> And so when his conveyances during coverture defeat her dower, any conveyance made for this purpose alone may be set aside as fraudulent.<sup>16</sup> But as a general thing, after marriage no act of the husband can defeat the wife's dower.<sup>17</sup> This was the rule

at common law,<sup>18</sup> and is still by statute the rule in Alabama,<sup>19</sup> Arkansas,<sup>20</sup> Delaware,<sup>21</sup> District of Columbia,<sup>22</sup> Florida,<sup>23</sup> Illinois,<sup>24</sup> Kentucky,<sup>25</sup> Maine,<sup>26</sup> Maryland,<sup>27</sup> Michigan,<sup>28</sup> Missouri,<sup>29</sup> New Jersey,<sup>30</sup> New York,<sup>31</sup> North Carolina,<sup>32</sup> Ohio,<sup>33</sup> Oregon,<sup>34</sup> Rhode Island,<sup>35</sup> South Carolina,<sup>36</sup> Virginia,<sup>37</sup> and Wisconsin.<sup>38</sup> In England,<sup>39</sup> Connecticut,<sup>40</sup> Georgia,<sup>41</sup> New Hampshire,<sup>42</sup> Pennsylvania,<sup>43</sup> Tennessee,<sup>44</sup> and Vermont,<sup>45</sup> however, a husband may by statute dispose of his property without his wife's joinder. These statutes apply only to contracts made by the husband after their passage;<sup>46</sup> and do not enable the husband to defeat dower by will.<sup>47</sup>

1 Houston v. Smith, 88 N. C. 312, 313; *ante*, § 252.

2 Rawlings v. Adams, 7 Md. 26, 51; Beth v. Cocke, 1 Rand. 361, 346; *ante*, § 252.

3 Rands v. Kendall, 15 Ohio, 671, 676; *ante*, § 253.

4 Oldham v. Sale, 1 Mon. B. 376.

5 Gully v. Ray, 18 Mon. B. 107, 113; Rawlings v. Adams, 7 Md. 26, 54.

6 Richardson v. Skolfield, 45 Me. 389.

7 King, 61 Ala. 479, 481; Withed v. Malloy, 4 Cush. 133, 140.

8 Adkins v. Holmes, 12 Cart. 197, 199; Kintner v. Melroe, 2 Cart. 453; Dean v. Mitchell, 4 Marsh. J. J. 451; Gaines, 9 Mon. B. 295; 48 Am. Dec. 425; Bowie v. Berry, 3 Md. Ch. 359; Cowman v. Hall, 3 Gill & J. 398; Firestone, 2 Ohio St. 415.

9 Stewart, 3 Marsh. J. J. 48, 49; 23 Am. Dec. 396.

10 Ingram v. Morris, 4 Har. (Del.) 111.

11 Discussed, *post*, § 293.

12 Discussed, *ante*, § 256.

13 Spangler v. Stanler, 1 Md. Ch. 36, 37; *ante*, § 254.

14 Link v. Edmondson, 19 Mo. 487.

15 Cranson, 4 Mich. 230, 236; Nye v. Patterson, 35 Mich. 415, 417; Pomeroy, 51 How. Pr. 228, 232; Brewer v. Connel, 11 Humph. 500, 501; discussed, Stewart M. & D. § 41.

16 Gibson v. Hutchinson, 120 Mass. 27, 32; Crecellus v. Horst, 11 Mo. App. 304, 306; Jenny, 21 Vt. 324, 326. But see Stroad v. O'Neill, 13 Mo. App. 581; 20 Cent. L. J. 308.

17 Crecellus v. Horst, 11 Mo. App. 304, 306. See Gerry v. Stinson, 60 Me. 186, 191; *ante*, § 258.

18 2 Scribner Dow. 603; Benson v. Scot, 3 Lev. 385, 386; Davis v. McDonald, 42 Ga. 205; Sutherland, 60 Ill. 481; Miller v. Steffer, 32 Mich. 194; Grady v. McCorkie, 57 Mo. 172; 17 Am. Rep. 676.

19 Ala. Code 1876, p. 578; Irvine v. Armistead, 46 Ala. 363.

20 Ark. Dig. 1874, p. 455; Tate v. Jay, 31 Ark. 576; Menfee, 3 Eng. 9; Crittenden v. Johnson, 6 Eng. 91; Crittenden v. Woodruff, 6 Eng. 82.

- 21 Del. R. C. 1874, p. 533; *Griffin v. Reece*, 1 Har. (Del.) 508.
- 22 D. C. R. C. ch. 49, § 1.
- 23 Fla. Dig. 1881, p. 475; *McMahon v. Russell*, 17 Fla. 698.
- 24 Ill. R. S. 1880, *Boyles v. McMurphy*, 55 Ill. 236; *Sisk v. Smith*, 6 Ill. 503; *Gold v. Ryan*, 14 Ill. 53; *Mowbry*, 64 Ill. 383; *Sutherland*, 69 Ill. 481; *Taylor*, 55 Ill. 252.
- 25 Ky. R. S. 1873, p. 527; *Harrow v. Johnson*, 3 Met. (Ky.) 578.
- 26 Me. R. S. 1871, p. 756; *Drummond*, 40 Me. 35; *Simonton v. Gray*, 34 Me. 50.
- 27 Md. R. C. 1878, p. 397; *Price v. Hobbs*, 47 Md. 359; *Mildred v. Nell*, 2 Bland, 354; *Ewings v. Ennols*, 2 Bland, 354.
- 28 Mich. R. S. 1882, § 5745; *Miller v. Steffer*, 32 Mich. 194.
- 29 Mo. R. S. 1879, p. 363; *Grady v. McCorkle*, 57 Mo. 172; 17 Am. Rep. 676; *Mount v. Valle*, 19 Mo. 621; *Hornsey v. Casey*, 21 Mo. 545; *Stone*, 18 Mo. 389; *Kentnerly v. Mo.* 11 Mo. 204.
- 30 N. J. Rev. 1877, p. 320; *Hays v. Whitall*, 13 N. J. Eq. 241; *Yeo v. Mercereau*, 18 N. J. L. 387; *Lloyd v. Conover*, 25 N. J. L. 47, 51.
- 31 N. Y. R. S. 1882, p. 2197; *Harrison v. Peck*, 56 Barb. 251; *Swalne v. Perine*, 5 Johns. Ch. 487, 490; 9 Am. Dec. 318.
- 32 N. C. Bat. Rev. 1873, p. 838; *O'Kelly v. Williams*, 84 N. C. 281; *Rose*, 63 N. C. 391; *Sutton v. Askew*, 66 N. C. 172; 8 Am. Rep. 500; *Holliday v. McMillan*, 79 N. C. 315.
- 33 Ohio R. S. 1880, p. 1048.
- 34 Oreg. G. L. 1874, p. 584.
- 35 R. I. P. S. 1882, p. 637.
- 36 S. C. R. S. 1873, p. 429; *Avant v. Robertson*, 2 McMull. 215.
- 37 Va. R. S. 1873, p. 853; *Macauley v. Dismal*, 2 Rob. Va. 507; *Higginbotham v. Cornwell*, 8 Gratt. 83; 56 Am. Dec. 130.
- 38 Wis. R. S. 1878, p. 626.
- 39 3 and 4 Wm. IV. ch. 105, § 2; *Fry v. Noble*, 24 Law J. N. S. 531; 7 DeGex, M. & G. 637.
- 40 Conn. P. A. 1875, p. 376; *Laws of 1877*, p. 211; *Stewart*, 5 Conn. 320; *Steadman v. Fortune*, 5 Conn. 462; *Calder v. Bull*, 2 Root, 50.
- 41 Ga. Code 1873, p. 304, § 1763; *Code*, 1882, § 1763 *a*; *Day v. Solomon*, 40 Ga. 32; *Hart v. McCullum*, 28 Ga. 478; *Green v. Causey*, 10 Ga. 425; *Simons v. Latimer*, 37 Ga. 490.
- 42 N. H. G. L. 1878, p. 474.
- 43 *Reed v. Morrison*, 13 Serg. & R. 18, 21; 1 Scribner Dow. 625.
- 44 Tenn. R. S. 1871, § 2398; *Combs v. Young*, 4 Tex. 218; *Chester v. Greer*, 5 Humph. 26.
- 45 Vt. R. S. 1880, § 2215; *Thayer*, 14 Vt. 107; 39 Am. Dec. 211; *Ladd*, 14 Vt. 185; *Gorham v. Daniels*, 23 Vt. 600.
- 46 *Fry v. Noble*, 7 DeGex, M. & G. 637.
- 47 *Stewart*, 5 Conn. 317.

§ 269. **Wife's acts during coverture which defeat dower.**  
 —Under statutes such as 13 Edward I., ch. 34, a wife may defeat her dower by elopement and adultery,<sup>1</sup> or



by adultery alone,<sup>2</sup> or by abandonment alone;<sup>3</sup> but this result from her breaches of marriage obligations depends on statute entirely.<sup>4</sup> Nor can any act in the nature of a contract affect her rights to dower except by virtue of a statute; her dower must be released in the mode prescribed by law.<sup>5</sup>

1 See Alex. Brit. Stat. p. 138; Stewart M. & D. § 178.

2 Ga. R. C. 1873, § 1764.

3 Thornberry, 18 W. Va. 522; Stewart M. & D. § 177.

4 See Stewart M. & D. §§ 177, 178.

5 Sisk v. Smith, 6 Ill. 503, 509; *post*, § 276.

§ 270. **Release of dower, generally.** — It was long doubtful whether a wife could release her dower at all;<sup>1</sup> but it was finally settled at common law that she could release by fine or common recovery.<sup>2</sup> In Massachusetts, it was released from early times by deed through custom;<sup>3</sup> and now, wherever the sole deed of the husband will not destroy dower,<sup>4</sup> statutes provide for its relinquishment by her.<sup>5</sup> But separate property acts have no effect on a wife's interest in her husband's lands,<sup>6</sup> so that her release of dower stands on a different footing from her ordinary conveyances.<sup>7</sup> The provisions of the statute must be strictly complied with,<sup>8</sup> and a release not good at law is not good at all;<sup>9</sup> equity will not even rectify a deed as against the wife;<sup>10</sup> nor does anything short of an actual release, for example, an agreement to give a release,<sup>11</sup> have any effect on her right.<sup>12</sup> So that dower cannot be released by parol,<sup>13</sup> but only by deed duly sealed,<sup>14</sup> unless of course the statutes require no seal.<sup>15</sup> Nor will a release be presumed from adverse possession until twenty years after the husband's death;<sup>16</sup> and a release will never be presumed to have been executed during coverture in favor of one who does not claim under the husband but adversely to him.<sup>17</sup> The deed of release need not be in



any particular form,<sup>18</sup> but in most States it must expressly state that the purpose of the wife is to release her dower<sup>19</sup>—even that she signed “in token of her free consent,” has been held not sufficient;<sup>20</sup> but in other States it suffices if she join in the granting clause,<sup>21</sup> and if there are no limiting words, she grants all her interest;<sup>22</sup> and in New Hampshire, by custom, her mere signature beneath her husband's is sufficient,<sup>23</sup> and the same seems to be the effect of the Illinois statute.<sup>24</sup> The deed does not take effect until delivery, and until that time she may revoke her signature.<sup>25</sup> The fact that some defect in the lease is due to her fraud makes no difference.<sup>26</sup> It seems that a married woman cannot execute a blank deed of release, leaving it to her husband to fill it up.<sup>27</sup>

1 Lampet, 10 Coke, 49; 2 Scribner Dow. 283, 284.

2 Haverington, Owen, 6; Beckwith, 2 Coke, 57 a; Park Dow. 200; 2 Scribner Dow. 255; Powell v. Monson, 3 Mason, 347, 351; Chase, 1 Bland, 206, 228; 17 Am. Dec. 277; Jackson v. Gilchrist, 15 Johns. 89, 109.

3 French v. Peters, 33 Me. 396, 408; Hall v. Savage, 4 Mason, 273.

4 Discussed *ante*, § 263.

5 The statute of the particular State should be carefully examined.

6 McCormick v. Hunter, 50 Ind. 136, 188; Blake, 7 Iowa, 46, 51, 55; Ulp v. Campbell, 19 Pa. St. 361, 363; Townsend v. Brown, 16 S. C. 91; *ante*, § 267.

7 *Ante*, §§ 205, 236; *post*, DEEDS OF MARRIED WOMEN, §§ 394-408.

8 Russell v. Amphlet, 27 Ark. 339, 341; Stidham v. Matthews, 29 Ark. 650, 657, 658; Davis v. McDonald, 42 Ga. 205, 207; Grove v. Tohl, 41 Md. 633, 639; 20 Am. Rep. 76; Conover v. Porter, 14 Ohio St. 450, 454. See Raverty v. Fridge, 3 McLean, 230; Clark v. Redman, 1 Blackf. 379; 12 Am. Dec. 213; O'Ferrall v. Simplot, 4 Iowa, 381; Rogers v. Woody, 23 Mo. 543; Sheppard v. Wardell, 1 N. J. L. 452; Moore v. Thomas, 1 Oreg. 201; Thompson v. Morrow, 5 Scrg. & R. 259; 9 Am. Dec. 358; Kirk v. Dean, 2 Binn. 341; *post*, §§ 400, 401.

9 Carr v. Williams, 10 Ohio, 305, 310; 36 Am. Dec. 87; *infra*, n. 12.

10 Davenport v. Sovil, 6 Ohio St. 459, 466; *infra*, n. 12.

11 Atwater v. Buckingham, 5 Day, 492, 497; *infra*, n. 12; *post*, § 407.

12 Stidman v. Matthews, 29 Ark. 650, 658; Atwater v. Buckingham, 5 Day, 492, 497; White, 16 N. J. L. 207, 211; Marvin v. Smith, 46 N. Y. 571, 574; Wiswall v. Hall, 3 Paige, 313, 317; Green v. Branton, 1 Dev. Eq. 500, 503; Purcell v. Goshorn, 17 Ohio, 105, 124; 44 Am. Dec. 448; Davenport v. Sovil, 6 Ohio St. 459, 463; Carr v. Williams, 10 Ohio, 305, 310; 36 Am. Dec. 87. See Tevis v. Richardson, 7 Mon. 654, 659; Richmond v. Robinson, 12 Mich. 193, 201; Martin v. Dwelly, 6 Wend. 9, 13;

H. & W.—35.

21 Am. Dec. 245; *Roseburgh v. Sterling*, 27 Pa. St. 292, 293; *post*, § 404. *Contra*, *Lake v. Gray*, 30 Iowa, 415, 419; *County v. Geiger*, 1 Call, 190, 193.

13 *Davis*, 61 Me. 335, 339; *Lathrop v. Foster*, 51 Me. 367, 369; *Worthington v. Middleton*, 6 Dana, 300, 303; *Keeler v. Tatnell*, 23 N. J. L. 62.

14 *Manning v. Laboree*, 33 Me. 343, 346. *S. P.*, *Brown v. Starke*, 3 Dana, 316; *Sargent v. Roberts*, 34 Me. 135, 137; *Tasker v. Bartlett*, 5 Cush. 359; *Giles v. Moore*, 4 Gray, 600, 601; *Foster v. Dennison*, 9 Ohio, 121; *Walsh v. Kelly*, 34 Pa. St. 84, 85.

15 2 *Scribner Dow*, 298.

16 *Barnard v. Edwards*, 4 N. H. 321, 327; 17 Am. Dec. 403; *post*, § 277.

17 *Durham v. Angler*, 20 Me. 242, 245.

18 See *Dundas v. Hitchcock*, 12 How. 256, 267; *Meyer v. Gossett*, 39 Ark. 377, 380; *Davis v. Bartholemew*, 3 Ind. 485, 491; *Frost v. Deering*, 21 Me. 156, 159; *Usher v. Richardson*, 29 Me. 415; *Stearns v. Swift*, 8 Pick. 532, 535; *Gray v. McCune*, 23 Pa. St. 447, 451.

19 *Hall v. Savage*, 4 Mason, 273, 275; *Powell v. Monson*, 3 Mason, 347, 349; *Davis v. Bartholemew*, 3 Ind. 485, 491; *Cox v. Wells*, 7 Blackf. 410; *Hatcher v. Andrews*, 5 Bush, 561, 565; *McDowell v. Prather*, 8 Bush, 46, 61; *Lathrop v. Foster*, 51 Me. 367, 369; *Stevens v. Owen*, 25 Me. 94, 99; *Fowler v. Shearer*, 7 Mass. 14, 20, *Catlin v. Ware*, 9 Mass. 218, 220; 6 Am. Dec. 56; *Leavitt v. Lamprey*, 13 Pick. 382; 23 Am. Dec. 685; *McFarland v. Febiger*, 7 Ohio, 194, 195; 28 Am. Dec. 632; *Carter v. Goodin*, 3 Ohio St. 75, 78. In such case no words of grant are necessary: *Stearns v. Swift*, 8 Pick. 532, 535.

20 *Stevens v. Owen*, 25 Me. 94, 98.

21 *Learned v. Cutler*, 18 Pick. 9, 12; *Gillilan v. Swift*, 14 Hun, 574, 576; *Smith v. Hany*, 16 Ohio, 191, 223.

22 *Daly v. Willis*, 5 Lea, 100, 104.

23 *Burge v. Smith*, 27 N. H. 332, 333; *Dustin v. Steele*, 27 N. H. 431, 432.

24 *Johnson v. Montgomery*, 51 Ill. 185, 190.

25 *Leland*, 13 Pa. St. 81, 85. Not after: *McNeely v. Kucker*, 6 Blackf. 391, 394.

26 *McFarland v. Febiger*, 7 Ohio, 191, 195; 28 Am. Dec. 632; *post*, § 416, 418.

27 *Drury v. Foster*, 2 Wall. 24, 34; *Conover v. Porter*, 14 Ohio St. 450, 454; *post*, §§ 400, 402, 407.

§ 271. Release of dower, parties, consideration, etc.— Unless the statute expressly authorizes this,<sup>1</sup> a wife cannot release her dower by her sole deed,<sup>2</sup> but must join with her husband.<sup>3</sup> But she need not execute the deed at the same time as her husband,<sup>4</sup> and may even re-execute it if it is as first defectively acknowledged.<sup>5</sup> It has the same effect as her joinder with her husband if she joins with his attorney in fact,<sup>6</sup> or in case of his

insanity, with his guardian.<sup>7</sup> Though she may have another sign the release for her in her presence,<sup>8</sup> except under the Connecticut statute,<sup>9</sup> she cannot release her dower by power of attorney,<sup>10</sup> except where expressly authorized by statute;<sup>11</sup> nor can her guardian release her dower.<sup>12</sup> But statutes providing for the release of dower have reference solely to the disability of coverture,<sup>13</sup> and a release though duly executed will not be valid if the wife is an infant;<sup>14</sup> this disability is totally distinct from that of coverture,<sup>15</sup> and renders the deed, under the better view, voidable,<sup>16</sup> or, as it is sometimes said, void;<sup>17</sup> if voidable, it is avoided by her subsequent deed of the same property.<sup>18</sup> For like reasons an insane wife cannot release dower.<sup>19</sup> And a statute providing that any woman of lawful age may release her dower, means lawful age for contracting, not lawful age for marrying.<sup>20</sup> But statutes sometimes provide specially for the release of dower when the wife is an infant,<sup>21</sup> or insane.<sup>22</sup> As a rule, statutes removing the general incapacities of a married woman do not affect her capacities towards her husband,<sup>23</sup> and therefore, a married woman's release of her dower to her husband is void;<sup>24</sup>—the same rules applicable in law to her ordinary contracts with her husband apply.<sup>25</sup> The release cannot be made to a stranger,<sup>26</sup> but only to one who in some way holds under the husband;<sup>27</sup> to the grantee of the husband,<sup>28</sup> or one who afterwards buys the fee;<sup>29</sup> to the owner of the fee;<sup>30</sup> to the equitable owner;<sup>31</sup> to one who has warranted the title;<sup>32</sup> for the release operates by way of estoppel,<sup>33</sup> and the estoppel must be mutual;<sup>34</sup> inchoate dower, it must be remembered, cannot be bargained and sold but only released.<sup>35</sup> The wife may reserve a consideration moving to herself for her release,<sup>36</sup> but none is implied,<sup>37</sup> and a consideration moving to her husband is sufficient.<sup>38</sup>

- 1 Moore v. Tisdale, 5 Mon. B. 352, 356. As in Md. R. C. 1878, p. 483, § 30.
- 2 Husband must join also in release of dower in former husband's lands: Osborn v. Horine, 19 Ill. 124, 125.
- 3 Moore v. Tisdale, 5 Mon. B. 352, 356; Shaw v. Russ, 14 Me. 432; French v. Peters, 33 Me. 396, 410; Page, 6 Cush. 196, 198; Stearns v. Swift, 8 Pick. 532, 536; Rannels v. Gehnor, 18 Cent. L. J. 182; Mallory v. Horan, 12 Abb. Pr. N. S. 289, 295; Willing v. Peters, 7 Pa. St. 287, 288; Ulp v. Campbell, 19 Pa. St. 361, 363. But see Powell v. Monson, 3 Mason, 347, 351. *Contra*, Gordon v. Haywood, 2 N. H. 402, 405.
- 4 Forg v. Gregory, 10 Mon. B. 175, 180; Frost v. Deering, 21 Me. 156, 159; Ludlow v. O'Neill, 20 Ohio St. 181, 183; Williams v. Robson, 6 Ohio St. 510, 515; Montgomery v. Hobson, Meigs, 437, 451.
- 5 Newell v. Anderson, 7 Ohio St. 12, 15.
- 6 Fowler v. Shearer, 7 Mass. 14, 21; Glenn v. Bank, 8 Ohio, 72, 73.
- 7 Rannels v. Gehnor, 9 Mo. App. 506, 511; 18 Cent. L. J. 182.
- 8 Frost v. Deering, 21 Me. 156, 159. See *post*, § 412.
- 9 Lindsey v. Brown, 13 Conn. 192, 194, 195.
- 10 Lewis v. Coxe, 5 Har. (Del.) 401, 402; Dawson v. Shirley, 6 Blackf. 531, 532; Steele v. Lewis, 1 Mon. 48; Shanks v. Lancaster, 5 Gratt. 110, 113; 50 Am. Dec. 108; Sumner v. Conant, 10 Vt. 9, 20; *post*, § 406.
- 11 De Bar v. Priest, 6 Mo. App. 531, 535.
- 12 Eslava v. Lepretre, 21 Ala. 504, 529; 56 Am. Dec. 266.
- 13 Watson v. Billings, 38 Ark. 278, 280; 42 Am. Rep. 1; Phillips v. Green, 3 Marsh. A. K. 7, 11; 23 Am. Dec. 124; Prewitt v. Graves, 5 Marsh. J. J. 115, 120; Webb v. Hall, 35 Me. 336, 338; Bool v. Mix, 17 Wend. 119, 129; 31 Am. Dec. 285; Hughes v. Watson, 10 Ohio, 127, 134; Thomas v. Gammel, 6 Leigh, 9, 12.
- 14 Webb v. Hall, 35 Me. 336, 338; *supra*, n. 13.
- 15 Bool v. Mix, 17 Wend. 119, 129; 31 Am. Dec. 285; *supra*, n. 13; *post*, § 339.
- 16 Cresinger v. Welch, 15 Ohio, 159, 191; 45 Am. Dec. 565. S. P., Watson v. Billings, 38 Ark. 278, 281; 42 Am. Rep. 1; Phillips v. Green, 3 Marsh. A. K. 7, 11; 23 Am. Dec. 124; Adams v. Palmer, 51 Me. 480, 488; Yourse v. Norcours, 12 Mo. 549, 563; 51 Am. Dec. 175; Bool v. Mix, 17 Wend. 119, 130; 31 Am. Dec. 285; Hughes v. Watson, 10 Ohio, 127, 134; Thomas v. Gammel, 6 Leigh, 9, 12.
- 17 Glenn v. Clarke, 53 Md. 580, 603, 604; Chandler v. McKinnery, 6 Mich. 217, 220; Sandford v. McLean, 3 Paige, 117, 121; 23 Am. Dec. 773; Schrader v. Decker, 9 Pa. St. 14, 16; 49 Am. Dec. 538.
- 18 Youse v. Norcoms, 12 Mo. 549, 564; 51 Am. Dec. 175; Cresinger v. Welch, 15 Ohio, 159, 191; 45 Am. Dec. 565. If she avoids it, she need not pay back any of the purchase money: Markham v. Merrett, 8 Miss. 437, 444; *post*, § 412. Age is presumed: Battin v. Bigelow, 1 Peters C. C. 452, 453.
- 19 McElwain, 29 Ill. 442, 443.
- 20 McMorris v. Webb, 17 S. C. 558, 562; 43 Am. Rep. 629.
- 21 McMorris v. Webb, 17 S. C. 558, 561; 43 Am. Rep. 629; Ald. R. C. 1876, § 2236; Ind. R. S. 1881, § 2939; Me. R. S. 1871, p. 757, § 6.
- 22 Iowa R. S. 1880, §§ 2216-2219; Mass. P. S. 1882, p. 540, § 20; Mo. R. S. 1879, § 2235; Ohio R. S. 1880, § 5722; Va. Code, 1873, p. 933, § 11; Wis. R. S. 1878, §§ 2225, 2226.

23 Discussed *ante*, §§ 14, 43.

24 *Martin*, 22 Ala. 86, 101; *Markling*, 30 Ark. 17, 24; *Pillow v. Wade*, 31 Ark. 678, 681; *Rowe v. Hamilton*, 3 Me. 63, 67; *Mallory v. Horan*, 12 Abb. Pr. N. S. 289, 295; *Crain v. Cavana*, 36 Barb. 410, 412; *Graham v. Van Wyck*, 14 Barb. 531, 532; *Townsend*, 2 Sand. 711, 713, 714; *Walsh v. Kelly*, 34 Pa. St. 84, 85; *Burdick v. Briggs*, 11 Wis. 126, 132. But see *Blake*, 7 Iowa, 46, 54.

25 Consult fully *ante*, § 43.

26 *Stidham v. Matthews*, 29 Ark. 650, 659; *Chicago v. Kinzie*, 49 Ill. 289, 295; *Robbins v. Kinzie*, 45 Ill. 354, 359; *La Framboise v. Crow*, 56 Ill. 197, 200; *Summers v. Babb*, 13 Ill. 483, 484; *Harriman v. Gray*, 49 Me. 537, 538; *French v. Lord*, 69 Me. 537, 542; *Reiff v. Horst*, 55 Md. 42, 47; *Marvin v. Smith*, 46 N. Y. 571, 574; *Mallory v. Horan*, 12 Abb. Pr. N. S. 289, 295.

27 *Reiff v. Horst*, 55 Md. 42, 47; *supra*, n. 26.

28 *Marvin v. Smith*, 46 N. Y. 571, 574; *supra*, n. 26.

29 *Harriman v. Gray*, 49 Me. 537, 538.

30 *Summers v. Babb*, 13 Ill. 483, 484; *supra*, n. 26.

31 *Chicago v. Kinzie*, 49 Ill. 289, 295.

32 *Robbins v. Kinzie*, 45 Ill. 354, 359.

33 *French v. Lord*, 69 Me. 537, 542; *post*, §§ 272, 276.

34 *Kitzmiller v. Van Rensselaer*, 10 Ohio St. 63, 64; *post*, §§ 272, 276.

35 *Reiff v. Horst*, 55 Md. 42, 47; *ante*, § 262.

36 *Bailey v. Litten*, 52 Ala. 282, 285; *Reiff v. Horst*, 55 Md. 42, 47; *Miller v. Crawford*, 32 Gratt. 277, 286.

37 *Hiscock v. Jaycox*, 12 Bank. Reg. 507.

38 *Bailey v. Litten*, 52 Ala. 282, 285.

§ 272. Release of dower—Effect of.—A married woman's release of her unassigned dower cannot take effect as a grant,<sup>1</sup> but operates only by way of estoppel;<sup>2</sup> and as an estoppel must be mutual,<sup>3</sup> a stranger to the release cannot avail himself of it;<sup>4</sup> it can be set up only by one who claims title under it,<sup>5</sup> by the husband's grantee,<sup>6</sup> or some one entitled to stand in his shoes;<sup>7</sup> thus, when a wife joins her husband in a mortgage, only the mortgagee or one claiming under the mortgage, can set up her release of dower;<sup>8</sup> against all others she has her dower,<sup>9</sup> and if the mortgage is foreclosed after the husband's death, she has dower in the surplus,<sup>10</sup> even where, instead of foreclosing a mortgage, the property is sold by the husband's assignee in bankruptcy, and the debt is paid, the purchaser

takes the property subject to her dower.<sup>11</sup> So when she joins in a lease she does not affect her rights in the reversion or the rent;<sup>12</sup> nor does her release to one tenant in common affect her rights as against the other tenants in common.<sup>13</sup> She is not, moreover, estopped from setting up a subsequent title in herself,<sup>14</sup> or from alleging her husband's fraud.<sup>15</sup> The effect of the release is confined to the property actually referred to;<sup>16</sup> and if a mistake is made in the description, the deed will not be rectified as against the wife.<sup>17</sup> Nor if she joins with her husband avowedly to "release her dower" does the deed have any effect as a conveyance of her own property,<sup>18</sup> even if no property of her husband's is referred to;<sup>19</sup> of course, the deed may be so drawn as to release her dower and convey her own property also.<sup>20</sup> If she release dower, the release covers dower in the same land under a former husband.<sup>21</sup> But if she conveys property as guardian,<sup>22</sup> or as administratrix,<sup>23</sup> she does not release her dower; though if she convey in a representative capacity and her individual capacity also, her dower is gone.<sup>24</sup> If the deed in which she joins to release her dower is set aside, or for any reason becomes inoperative—as where a mortgage debt is paid,<sup>25</sup> or a deed in fraud of creditors is set aside by them,<sup>26</sup> even when the fraudulent deed was to the wife herself<sup>27</sup>—she has her dower as if she had not joined therein;<sup>28</sup> but the deed must really become inoperative;<sup>29</sup> it is not sufficient if the grantee from laches never has had any benefit thereunder.<sup>30</sup>

1 *Reiff v. Horst*, 55 Md. 42, 47; *ante*, §§ 262, 263.

2 *French v. Lord*, 69 Mo. 577, 542; *Reiff v. Horst*, 55 Md. 42, 47; *Mallory v. Horan*, 12 Abb. Pr. N. S. 283, 295; *post*, § 410.

3 *Kitzmiller v. Van Rensselaer*, 10 Ohio St. 63, 64.

4 *Robinson v. Bates*, 3 Met. 40; *infra*, n. 7.

5 *Mallory v. Horan*, 12 Abb. Pr. N. S. 289, 295; *infra*, n. 7.

6 *Dearborn v. Taylor*, 18 N. H. 153, 158; *infra*, n. 7.

7 Blair v. Harrison, 11 Ill. 384, 386. S. P., Robbins v. Kinzie, 45 Ill. 354, 359; Gove v. Cather, 23 Ill. 634, 641; French v. Crosby, 61 Me. 502, 504; French v. Lord, 69 Me. 537, 542; Harriman v. Gray, 49 Me. 537, 538; Littlefield v. Crocker, 39 Me. 192, 193; Robinson v. Bates, 3 Met. 40, 42; Pixley v. Bennett, 11 Mass. 298; Pearson v. Williams, 23 Miss. 64, 63; Harrison v. Eldridge, 7 N. J. L. 392, 411; Dearborn v. Taylor, 18 N. H. 153, 158; Mallory v. Horan, 12 Abb. Pr. N. S. 289, 295; Gray v. McCune, 23 Pa. St. 447, 451. *Contra*, Elmdorf v. Lockwood, 57 N. Y. 322, 325.

8 Blair v. Harrison, 11 Ill. 384, 386; Johnson v. Hines, 61 Md. 123, 129; *ante*, §§ 260, 261.

9 Young v. Tarbell, 37 Me. 509, 515; *ante*, §§ 260, 261.

10 Chew v. Farmers, 9 Gill, 361, 374; *ante*, § 261.

11 Bartenbach, 11 Bank. Reg. 61.

12 Herbert v. Wren, 7 Cranch, 370; Chase, 1 Bland, 206, 231; 17 Am. Dec. 277.

13 White, 16 N. J. L. 202, 215.

14 Blair v. Harrison, 11 Ill. 384, 386; *post*, § 412.

15 Woodworth v. Paige, 5 Ohio St. 70, 74.

16 French v. Lord, 69 Me. 537, 542.

17 Sieben v. Franks, 52 Iowa, 642, 643; Davenport v. Sovil, 6 Ohio St. 459, 466; *ante*, § 270.

18 Hughes v. Wilkinson, 21 Ala. 296, 300; Raymond v. Holden, 2 Cush. 261, 270; McDaniel v. Priest, 12 Mo. 544, 546; Flagg v. Bean, 25 N. H. 49, 63; Foster v. Dennison, 9 Ohio, 121, 125; Mayo v. Foster, 2 McCord Ch. 137.

19 Flagg v. Bean, 25 N. H. 49, 63.

20 Gregory, 16 Ohio St. 560, 564.

21 Usher v. Richardson, 29 Me. 415, 417.

22 Jones v. Hollopeter, 10 Serg. & R. 326, 328.

23 Shurtz v. Thomas, 8 Pa. St. 359, 362. See Ritchie v. Putnam, 13 Wend. 524, 526.

24 Churchill v. Bee, 66 Ga. 621, 632.

25 Mallory v. Horan, 12 Abb. Pr. N. S. 289, 296.

26 Summers v. Babb, 13 Ill. 433, 434; *infra*, n. 23.

27 Richardson v. Wyman, 62 Me. 280, 283.

28 Hopplin, 96 Ill. 265, 271, 272; Morton v. Noble, 57 Ill. 176, 179; McKee v. Brown, 43 Ill. 130; Gove v. Cather, 23 Ill. 634, 641; Lockett v. James, 8 Bush, 28, 31; Richardson v. Wyman, 62 Me. 280, 284; Robinson v. Bates, 3 Met. 40; Stinson v. Sumner, 9 Mass. 143; 6 Am. Dec. 49; Pinson v. Williams, 23 Miss. 64, 63; Frey v. Boylan, 23 N. J. Eq. 90; Elmdorf v. Lockwood, 57 N. Y. 322, 325; Mallory v. Horan, 12 Abb. Pr. N. S. 289, 296; Clowes v. Dickenson, 5 Johns. Ch. 235, 246; Ridgway v. Masting, 23 Ohio St. 294, 296; Rickard v. Talbird, Rice Eq. 153.

29 Hopplin, 96 Ill. 265, 271, 272.

30 Morton v. Noble, 57 Ill. 176, 179.

§ 273. Jointure, legal and equitable.—Jointure is technically such a settlement on a wife as bars her of her



dower under the statute of uses,<sup>1</sup> for by the early common law dower could not be barred by any collateral satisfaction.<sup>2</sup> The settlement was so called because usually made upon the husband and wife jointly during coverture, and on her after her husband's death.<sup>3</sup> The word when used in a statute without qualification means legal jointure under the above-named statute;<sup>4</sup> but it is commonly used at present to mean any provision for a wife in lieu of her dower.<sup>5</sup> A legal jointure is such a provision as under the statute of uses or other statute bars her dower;<sup>6</sup> an equitable jointure is such a provision as puts her on her election to take it or dower.<sup>7</sup> Antenuptial contracts between the husband and wife, in which the wife agrees to give up her dower, have also been called equitable jointures;<sup>8</sup> but such contracts stand on a different footing, and are absolutely binding, if made between adults,<sup>9</sup> and voidable only if the woman were an infant.<sup>10</sup> To a strict legal jointure under the statute of uses, which is in force in this country as a part of the common law,<sup>11</sup> so far as consistent with the modern statutes,<sup>12</sup> the following are the requisites:<sup>13</sup> (1) The provision must consist in an estate or interest in land;<sup>14</sup> (2) it must take effect, in possession or profit, immediately from the death of the husband;<sup>15</sup> (3) it must be for the wife's life, at least;<sup>16</sup> (4) it must be limited to the wife herself, and not in trust for her;<sup>17</sup> (5) it must be made in satisfaction of her whole dower,<sup>18</sup> and must be so expressed in the deed;<sup>19</sup> (6) it must be a reasonable and competent provision for the wife's livelihood;<sup>20</sup> (7) it must be made before marriage.<sup>21</sup> Any other provision made for a wife expressly in lieu of dower<sup>22</sup> will, if she accepts it, bar her of dower in equity,<sup>23</sup> independently of statute;<sup>24</sup> it puts her to an election.<sup>25</sup> In most of the States statutes provide in what cases a wife shall be ab-



solutely barred by a provision in lieu of dower, and in what cases she may elect.<sup>26</sup> If, when the wife is absolutely barred she conveys away jointly with her husband her jointure lands,<sup>27</sup> she is nevertheless barred of her dower; but if she has the right of election she may claim her dower all the same.<sup>28</sup> If she is evicted of either kind<sup>29</sup> of jointure, she may be endowed of so much of the remainder of her husband's lands as may be necessary to make up her loss,<sup>30</sup> provided that she does not get more altogether than she would have had had she taken dower at first;<sup>31</sup> and she may be so endowed even as against her husband's alienee.<sup>32</sup> A jointure, unlike dower after assignment,<sup>33</sup> is not a continuance of the husband's estate;<sup>34</sup> the wife takes as a purchaser,<sup>35</sup> and is not entitled to the crops which were sown at the time of his death.<sup>36</sup>

1 27 Henry VIII. ch. 10, §§ 6-9; Alex. Brit. Stat. 300, 301; 2 Scribner Dow. 402.

2 Vernon, 4 Co. 1; Vincent v. Spooner, 2 Cush. 467, 473; Hastings v. Dickinson, 7 Mass. 153; 5 Am. Dec. 34.

3 Drury, Wilm. 185, 186; Vernon, 4 Co. 1 b.

4 Vance, 21 Me. 364.

5 Tevis v. McCreary, 3 Met. (Ky.) 151.

6 Drury, 3 Brown Parl. C. 492; Wilm. 177.

7 Hastings v. Dickinson, 7 Mass. 153, 155; 5 Am. Dec. 34.

8 Dyke v. Rendall, 13 Eng. L. & Eq. 404, 411; 2 DeGex, M. & G. 209.

9 Caruthers, 4 Bro. C. C. 513; *ante*, § 266.

10 McCartee v. Teller, 2 Paige, 511, 556, 559; 8 Wend. 267; Stewart M. & D. § 37.

11 Alex. Brit. Stat. 300, 301; *ante*, § 6.

12 Vance, 21 Me. 364; *ante*, § 6.

13 Co. Litt. 36 b; Levering v. Hughe, 2 Md. Ch. 81; Hastings v. Dickinson, 7 Mass. 153; 5 Am. Dec. 34.

14 Gibson, 15 Mass. 106; 8 Am. Dec. 94; Hastings v. Dickinson, 7 Mass. 153; 5 Am. Dec. 34; Vance, 21 Me. 364; Gelzer, 1 Bail. Eq. 387; Ball, 3 Munf. 279; 2 Scribner Dow. 394.

15 Vernon, 4 Co. 2 a; Caruthers, 4 Bro. C. C. 500, 513; Vance, 21 Me. 364; Gibson, 15 Mass. 106; 8 Am. Dec. 94; Crain v. Cavana, 63 Barb. 410; 2 Scribner Dow. 395.

16 Vernon, 4 Co. 2 b; McCartee v. Teller, 2 Paige, 511, 560; Gelzer, 1 Bail. Eq. 387; 2 Scribner Dow. 397.

17 Hervey, 1 Atk. 561; Co. Litt. 36 b; 2 Scribner Dow. 399.

18 *Bubier v. Roberts*, 49 Me. 460, 46a.

19 *Vernon*, 4 Co. 3 *a*; *Tinney*, 3 Atk. 8; *Charles v. Andrews*, 6 Mod. 152; *Caruthers*, 4 Bro. C. C. 500; *Garthshore v. Challe*, 10 Ves. Jr. 1, 20; *Green v. Porter*, 7 Port. 19; *Tevis v. McCreary*, 3 Met. (Ky.) 151; *Worsley*, 16 Mon. B. 455, 459; *Bubier v. Roberts*, 49 Me. 460, 465; *Perryman*, 19 Mo. 469; *Swaine v. Perine*, 5 Johns. Ch. 482; 9 Am. Dec. 318; *Liles v. Fleming*, 1 Dev. Eq. 185; *infra*, n. 22; *post*, ‡ 274. But see *Ambler v. Norton*, 4 Hen. & M. 23.

20 2 *Scribner Dow*, 404, 428.

21 *Martin*, 26 Ala. 86; *Rowe v. Hamilton*, 3 Me. 63; *Crain v. Cavana*, 36 Barb. 419; *Townsend*, 2 Sand. 711; *Walsh v. Kelly*, 34 Pa. St. 84.

22 *Worsley*, 16 Mon. B. 455, 459; *supra*, n. 19; *post*, ‡ 274

23 *Dyke v. Rendall*, 13 Eng. L. & Eq. 404, 411; 2 *DeGex*, M. & G. 209; *Blackmore*, 16 Ala. 633; *Farrow*, 1 Del. Ch. 457; *Raines v. Corbin*, 24 Ga. 185; *Garrard*, 7 Bush. 436; *Tevis v. McCreary*, 3 Met. (Ky.) 151; *Wentworth*, 69 Me. 247; *Levering v. Hughe*, 2 Md. Ch. 81; *Hastings v. Dickinson*, 7 Mass. 153, 155; 5 Am. Dec. 34; *Gibson*, 15 Mass. 156; 8 Am. Dec. 94; *McCartee v. Teller*, 2 Pidge, 511; 8 *Wend*, 267; *Tisdale v. Jones*, 38 Barb. 523; *Grogan v. Garrison*, 27 Ohio St. 50; *Jones*, 62 Pa. St. 324; *Gangwere*, 14 Pa. St. 417; *Rudolph*, 10 Pa. St. 34; *Rose v. Reynolds*, 1 Swan, 446; *Lacy v. Anderson*, 1 Swan, 445; *Parham*, 6 *Humph*. 287; *post*, §§ 274, 275.

24 *Logan v. Phillips*, 18 Mo. 22; *Johnson*, 23 Mo. 561; 30 Mo. 72.

25 Co. Litt. 36 *b*; *post*, §§ 274, 275.

26 *Rev. Stats.* as follows: Ark. 1874, §§ 2218-2224; Conn. 1875, pp. 376, 377; Conn. Acts, 1877, p. 211, § 4; Del. 1874, p. 533; Ill. 1880, p. 426; Ind. 1881, § 2500; Ky. 1881, p. 530; Me. 1871, p. 757; Md. 1878, art. 50, § 226; Mass. 1882, p. 741; Mich. 1882, §§ 5746-5749; Mo. 1879, §§ 2201, 2202; N. J. 1877, p. 322; N. Y. 1882, pp. 2197, 2198; Ohio 1880, § 4189; Oreg. 1874, p. 586; R. I. 1882, p. 640; S. C. 1882, p. 530; Va. 1873, p. 854; Vt. 1880, § 2219; Wis. 1879, §§ 2169-2172.

27 Co. Litt. 36 *b*; *Dyer*, 358 *b*.

28 1 *Greenl. Cruise*, 208; Co. Litt. 36 *b*.

29 *Gervoye*, *Moore C. P.* 717; *Beard v. Nutthall*, 1 *Vern.* 427; *Garrard*, 7 Bush. 436; *Hastings v. Dickinson*, 7 Mass. 153, 155; 5 Am. Dec. 34; *Gibson*, 15 Mass. 106, 111; 8 Am. Dec. 94.

30 *Hastings v. Dickinson*, 7 Mass. 153, 155; 5 Am. Dec. 34; *Camden v. Jones*, 23 N. J. Eq. 171; *Pierce*, 9 *Hun.* 50; *St. Clair v. Williams*, 7 Ohio, 110; 30 Am. Dec. 194; *Ambler v. Norton*, 4 Hen. & M. 23.

31 *Beard v. Nutthall*, 1 *Vern.* 427; *Tew v. Winterton*, 3 Bro. C. C. 489.

32 *Mannsfield*, Co. Litt. 33 *a*, n. 8; 1 *Greenl. Cruise*, 200.

33 Discussed *ante*, § 264.

34 *Fisher v. Forbes*, 9 *Vln. Abr.* 373.

35 See *Campion v. Cotton*, 17 Ves. 267; *Sterry v. Arden*, 1 Johns. Ch. 271; 12 Johns. 536; 7 Am. Dec. 348; *Herring v. Wickham*, 29 *Gratt.* 628; *Jones*, 62 Pa. St. 324.

36 *Fisher v. Forbes*, 9 *Vln. Abr.* 373.

‡ 274. *Equitable jointure*—Devise in lieu of dower.—It is a rule enforced in equity that one cannot accept the benefits under an instrument, and at the same time

defeat its provisions, so that if A transfers to B certain lands, and by the same instrument transfers to C certain lands belonging to B, B must let his own lands go to C if he accepts the lands transferred to him by A; he cannot have both, he must choose between them — he is put to an election.<sup>1</sup> This rule applies to dower as well as to other estates,<sup>2</sup> and to widows as well as to other persons;<sup>3</sup> and a widow cannot have her dower and also a provision made for her in lieu thereof by her husband's deed<sup>4</sup> or will.<sup>5</sup> For although the mass of cases have arisen with respect to provisions in wills, there is nothing to prevent the same rules, so far as they depend on the unwritten law and not on statutes, from applying equally to deeds.<sup>6</sup> The provision must be expressly in lieu of dower,<sup>7</sup> or the instrument must make a disposition of some part of the maker's estate which is clearly inconsistent with the existence of dower therein,<sup>8</sup> so that in claiming dower the widow would defeat, interrupt, or disappoint, some provision in the instrument.<sup>9</sup> No technical language is necessary,<sup>10</sup> but it has been found difficult to determine what provisions in a will are inconsistent with dower.<sup>11</sup> A devise of "all my estates" would not be,<sup>12</sup> for dower is the wife's estate and not the husband's;<sup>13</sup> it is an encumbrance on his property.<sup>14</sup> So that by leaving a wife a part of his property and disposing of the rest to others, her husband does not necessarily put her to an election, but she takes the devise and dower in the balance;<sup>15</sup> nor does a devise to her of all her husband's property prevent her from holding part as dower and part under the devise;<sup>16</sup> nor does a devise of all the property to trustees to sell and give her part of the proceeds put her to an election;<sup>17</sup> nor does an annuity charged on the land, unless the land, if subjected to dower, is not sufficient to pay the annuity.<sup>18</sup> But if such a disposition of the

estate is made as is inconsistent with the existence of dower therein, she must elect; as where trustees are directed to lease the whole of the land in possession;<sup>19</sup> so, if the instrument shows clearly his intention that she should have nothing excepting the provisions of the will;<sup>20</sup> as where he leaves her property during her widowhood only,<sup>21</sup> or equally with others.<sup>22</sup> But the widow is favored,<sup>23</sup> and the intent must be clear to exclude her;<sup>24</sup> and it must be ascertained from the instrument, for, except in Virginia,<sup>25</sup> parol evidence thereof is not admissible.<sup>26</sup> Such were the rules at common law, but in most States they have been changed by statute,<sup>27</sup> and any provision, generally of realty,<sup>28</sup> in a will for a wife, is presumed to have been intended as in lieu of dower, unless a contrary intent plainly appears from the will itself,<sup>29</sup> and the widow is required to elect within a specified time whether she will take the provisions in the will or her dower.<sup>30</sup> But a will which contains no provision in her favor does not put her to an election,<sup>31</sup> nor does a provision in a will in lieu of dower require her to elect as to lands of which the husband dies intestate,<sup>32</sup> for to take dower in such lands would not affect the other provisions in the instrument;<sup>33</sup> and the same applies to lands of the husband's sold by him,<sup>34</sup> or in execution against him,<sup>35</sup> during coverture; nor does a devise to her of lands in one State require her to elect as to lands in another State,<sup>36</sup> though this seems to be bad law.<sup>37</sup> The statutes are construed as favorably as possible to the widow, and where a devise to her requires her to elect, although not expressed to be in lieu of dower, a devise in trust for her will not have the same effect.<sup>38</sup> The statutes of the different States, however, differ in many and minute ways, and should in all cases be carefully consulted.

- 1 Adams Equity 92, 221, notes; 2 Scribner Dow. 410; 1 Lead. Cas. Eq. 319.
- 2 Birmingham v. Kirwan, 2 Schoales & L. 441, 450.
- 3 Dixon v. McCue, 14 Gratt. 540, 549.
- 4 Birmingham v. Kirwan, 2 Schoales & L. 444, 451; Parham, 6 Humph. 287, 297; 1 Bish. M. W. 383; *ante*, § 273.
- 5 Adsit, 2 Johns. Ch. 448, 450; 7 Am. Dec. 550; cases cited *infra*.
- 6 1 Bish. M. W. § 383; *ante*, § 273.
- 7 U. S. v. Duncan, 4 McLean, 90, 101; *infra*, n. 8.
- 8 Birmingham v. Kirwan, 2 Schoales & L. 441, 452; U. S. v. Duncan, 4 McLean, 90, 101; Green, 7 Port. 19; Apperson v. Bolton, 29 Ark. 418, 428; Lord, 23 Conn. 327, 331; Ailing v. Chatfield, 42 Conn. 276; Worthen v. Pearson, 33 Ga. 385, 387; Tooke v. Hardeman, 7 Ga. 20; Ostrander v. Spickard, 8 Blackf. 227; Kelly v. Stinson, 8 Blackf. 387; Clarke v. Griffith, 4 Iowa, 405; Potter v. Worley, 57 Ga. 66, 67; Van Guilder v. Justice, 56 Iowa, 630; Kyne, 48 Iowa, 21; Wilson v. Cox, 49 Miss. 538, 541; Copp v. Hensey, 31 N. H. 317; Colgate, 23 N. J. Eq. 372, 378; Freedland v. Manderville, 23 N. J. Eq. 539; Van Arsdale, 26 N. J. L. 407, 410; Stewart, 31 N. J. Eq. 398; Adsit, 2 Johns. Ch. 448, 459; 7 Am. Dec. 539; Jackson v. Churchill, 7 Cowen, 287; 17 Am. Dec. 514; Bets, 4 Abb. N. C. 317; Smith v. Kniskern, 4 Johns. Ch. 9; Wood, 5 Paige, 596; 28 Am. Dec. 451; Sandford v. Jackson, 10 Paige, 266; Havens, 1 Sand. Ch. 324; Tobias v. Ketchum, 36 Barb. 479; 32 N. Y. 319; Lingart v. Ripley, 19 Ohio St. 24; Sample, 2 Yeates, 433; Allen, 2 Pa. 311; Webb v. Evans, 1 Binn. 565; Chapin v. Hill, 1 R. I. 446; Gordon v. Stevens, 2 Hill, 46; 27 Am. Dec. 445; Brown v. Caldwell, 1 Spear Eq. 322; Cunningham v. Shannon, 4 Rich. Eq. 135; Dixon v. McCue, 14 Gratt. 540, 549; Higginbotham v. Cornwell, 8 Gratt. 83, 85; 56 Am. Dec. 130.
- 9 Corriell v. Ham, 2 Clarke, 552, 558.
- 10 Lord, 23 Conn. 327, 331.
- 11 See collected cases in 1 Lead. Cas. Eq. 319, *et seq.*
- 12 Sandford v. Jackson, 10 Paige, 266, 272, 273; Baxter v. Bowyer, 19 Ohio St. 490, 491.
- 13 Dixon v. McCue, 14 Gratt. 540, 555.
- 14 Barnett v. Gaines, 8 Ala. 373, 374; *ante*, §§ 262, 263.
- 15 Birmingham v. Kirwan, 2 Schoales & L. 444, 452; Colgate, 23 N. J. Eq. 372, 379. See Lawrence, 2 Vern. 365; 3 Brown Parl. C. 433; Lemon, 8 Vin. Abr. "Devise," p. 366, pl. 45; Holdich, 2 Younge & C. 18; Bending, 3 Kay & J. 257; Kelly v. Stinson, 8 Blackf. 357; Rahtbone v. Dyckman, 3 Paige, 9; Fuller v. Yates, 8 Paige, 325; Jackson v. Churchill, 7 Cowen, 287; 17 Am. Dec. 514; Havens, 1 Sand. Ch. 324; Mills, 23 Barb. 454; Lingart v. Ripley, 19 Ohio St. 24; Baxter v. Bowyer, 19 Ohio St. 490, 491; Webb v. Evans, 1 Binn. 565; Brown v. Caldwell, 1 Spears Eq. 322; Cunningham v. Shannon, 4 Rich. Eq. 135.
- 16 Church v. Bull, 2 Denio, 430; 5 Hill, 206; 43 Am. Dec. 754; Lewis v. Smith, 5 Seld. 502; 11 Barb. 152; Wisley v. Findlay, 3 Rand. 361, 372; 15 Am. Dec. 712. But see Stark v. Hinton, 1 N. J. Eq. 216.
- 17 Ellis v. Lewis, 3 Hare, 310; French v. Davies, 2 Ves. Jr. 572; Gibson, 1 Drew. 42; 12 Eng. L. & Eq. 340; Wood, 5 Paige, 596; 28 Am. Dec. 451; Gordon v. Stevens, 2 Hill Ch. 46; 27 Am. Dec. 445. But see Colgate, 23 N. J. Eq. 372, 361; Savage v. Burnham, 17 N. Y. 561; Hatch v. Bassett, 52 N. Y. 550.

18 Pearson, 1 Bro. C. C. 292. See *Foster v. Cook*, 3 Bro. C. C. 347; *Dawson v. Bell*, 1 Keen, 761, 765; *Arnold v. Hempstead*, 2 Eden, 236; *Bradley v. Dixon*, 3 Russ. 198; *Druce v. Dennison*, 6 Ves. Jr. 385; *Greatorex v. Carey*, 6 Ves. Jr. 615; *Worthen v. Pearson*, 33 Ga. 385, 387.

19 Parker v. Sowerby, 1 Drew. 483; 27 Eng. L. & Eq. 145. Consult *Miall v. Brain*, 4 Madd. 119; *O'Hara v. Chaine*, 1 Jones & L. 662; *Pepper v. Dixon*, 17 Sim. 200; *Athing v. Chatfield*, 42 Conn. 236; *Worthen v. Pearson*, 33 Ga. 385, 387; *Van Guilder v. Justice*, 57 Iowa, 669; *Tobias v. Ketchum*, 32 N. Y. 319; 1 Lead. Cas. Eq. 524, 561.

20 See 1 Lead. Cas. Eq. 300, 524, 561.

21 *Wilson v. Hayne*, 1 Cheves Eq. 37. See *Phillips v. Medbury*, 7 Conn. 563; *Lord*, 23 Conn. 327; *Collins v. Wood*, 63 Ill. 285; *Smith v. Bone*, 7 Bush, 367; *Stark v. Hunton*, 1 N. J. Eq. 216; *Lingart v. Shipley*, 19 Ohio St. 24; *Taylor v. Birmingham*, 29 Pa. St. 306; *Hamilton v. Buckwalter*, 2 Yeates, 349; 1 Am. Dec. 350; *Creacroft v. Dille*, 3 Yeates, 79; *Caston*, 2 Rich. Eq. 1. But see *Sully v. Nebergill*, 30 Iowa, 339; *Sandford v. Jackson*, 10 Palge, 266; *Church v. Bull*, 2 Denio, 430; 53 Am. Dec. 754; *Lewis v. Smith*, 5 Seld. 502; *Lasher*, 13 Barb. 106; *Webb v. Evans*, 1 Binn. 565.

22 *Chalmers v. Staril*, 2 Ves. & B. 222; *Jackson v. Robinson*, Jacob, 503; *Bailey v. Boyce*, 4 Strob. Eq. 84; *Carroll*, 20 Tex. 731; *Higginbotham v. Cornwell*, 8 Gratt. 83, 86; 56 Am. Dec. 130.

23 *Hardy v. Scales*, 54 Wis. 452, 455; *ante*, § 245.

24 *Dixon v. McCue*, 14 Gratt. 540, 543.

25 *Dixon v. McCue*, 14 Gratt. 540, 543, by statute.

26 *Stratton v. Best*, 1 Ves. Sr. 285; *Timber Lake*, 5 Dana, 345; *Hall*, 8 Rich. 407; *Chapin v. Hill*, 1 R. L. 446; *Dixon v. McCue*, 14 Gratt. 540, 548, 549.

27 *Wilson v. Cox*, 49 Miss. 533, 544; *Jennings*, 21 Ohio St. 56, 76; *Hardy v. Scales*, 54 Wis. 452, 455.

28 *U. S. v. Duncan*, 7 McLean, 90, 102; *Van Arsdale*, 26 N. J. L. 404, 411; *Wiseley v. Findlay*, 3 Rand. 361, 372; 15 Am. Dec. 712. See *Chandler v. Woodward*, 3 Har. (Del.) 428, 459; *Jennings v. Smith*, 29 Ill. 116; *Ostrander v. Spickard*, 8 Blackf. 227; *Shaw*, 2 Dana, 341; *Fulton*, 30 Miss. 586; *Wilson v. Cox*, 49 Miss. 533; *Hall*, 8 Rich. 407; *Whilden*, *Riley*, 205. Compare *Norris v. Clark*, 10 N. J. Eq. 51.

29 See 3 and 4 Wm. IV. ch. 105; Ala. Code, 1876, § 2292; Conn. R. S. 1875, p. 377, § 4; Del. Dig. 1874, p. 534, § 5; Fla. Dig. 1881, p. 475, § 1; Ill. R. S. 1880, p. 426, § 10; Ind. R. S. 1881, § 2505; Ky. R. S. 1881, p. 372, § 112; Me. R. S. 1871, p. 757, § 10; Md. R. C. 1878, p. 465, §§ 227-230. Mass. P. S. 1882, p. 750, § 18; Mich. R. S. 1882, § 5749; Mo. R. S. 1879, § 2199; N. J. Rev. 1877, p. 322, § 16; N. C. R. S. 1873, p. 839, § 2; Ohio R. S. 1880, § 5963; Oreg. R. S. 1874, p. 586, § 18; Pa. Dig. 1873, p. 529, § 4; Tenn. R. S. 1871, § 2404; Wls. R. S. 1878, § 2171.

30 Discussed *post*, § 275.

31 *Martin*, 35 Ala. 560, 566; *Daniel*, 4 Dana, 361; *Drummond*, 40 Me. 35, 39; *Roberts*, 34 Miss. 322. See *McLaren v. Clark*, 62 Ga. 106; *Simonton v. Houston*, 73 N. C. 408. *Contra*, *Lewis*, 7 Ired. 72.

32 *Hall*, 2 McCord Ch. 269, 299, 301. See *Van Arsdale*, 26 N. J. L. 404, 410; *Hardy v. Scales*, 54 Wis. 452, 455.

33 Which is the ground of election, *supra*, n. 1.

34 *Braxton v. Freeman*, 6 Rich. 35, 36; 57 Am. Dec. 773; *Higginbotham v. Cornwell*, 8 Gratt. 83, 85; 56 Am. Dec. 130. *S. P.*, *Westbrook v. Vanderburg*, 36 Mich. 30; *Barland v. Nichols*, 12 Pa. St. 38; *Gray v. McCune*, 23 Pa. St. 447. *Contra*, *Haynie v. Dickens*, 68 Ill.

267, 268; *Ravles v. Corbin*, 24 Ga. 185; *Allen v. Bay*, 12 Me. 138; *Steele v. Fisher*, 1 Edw. Ch. 435.

35 *Corriell v. Ham*, 2 Clarke, 552, 557.

36 *Van Arsdale*, 26 N. J. L. 404, 411; *Wilson v. Cox*, 49 Miss. 536, 546. See *Apperson v. Bolton*, 29 Ark. 418, 423; *Jennings*, 21 Ohio St. 56, 76.

37 Consult also *post*, § 275.

38 *Van Arsdale*, 26 N. J. L. 404, 409.

§ 275. **Widow's election.**—If a husband has exchanged some of his lands for others, his widow cannot have dower both in the lands exchanged and in the lands received in exchange, she must elect.<sup>1</sup> By the statute of uses, a jointure made during coverture on the wife in lieu of dower, put her to an election;<sup>2</sup> and this is true of any such provision which is not a legal jointure;<sup>3</sup> and it applies especially to devises in lieu of dower.<sup>4</sup> Generally, independently of statute, the election of the *widow*—for an election cannot be made during coverture<sup>5</sup>—is, if not expressed, implied from an entry upon the lands or a suit for dower,<sup>6</sup> or from the use and enjoyment by the widow of the provisions under the will.<sup>7</sup> But the implication from apparent acquiescence in the provisions of the will is always rebuttable, the longest acquiescence seems not to be conclusive;<sup>8</sup> it may be shown, for example, that the widow held the property by the consent of the heirs and not in her own right;<sup>9</sup> or that she really exercised no choice, either because she did not know that there were two estates to choose between,<sup>10</sup> or because she was deceived,<sup>11</sup> or mistaken,<sup>12</sup> or uninformed<sup>13</sup> as to their respective values. But as to devises in lieu of dower, which have given rise to most of the cases on this subject, it is nearly everywhere provided by statute how and within what time the widow shall elect.<sup>14</sup> In New York, if she does not enter on her dower lands or commence proceedings for dower within one year after her husband's death, she elects to take under the



will.<sup>15</sup> In Mississippi the time begins to run from the date of probate,<sup>16</sup> still she may renounce before probate,<sup>17</sup> and is bound by a defective probate in which she has acquiesced.<sup>18</sup> In Delaware she must have notice before she is bound to elect, which is not the rule independently of express provision.<sup>19</sup> In Indiana no time is fixed, and she may elect without restriction of time, as at common law.<sup>20</sup> In Maryland a written renunciation must be filed within six months after the husband's death.<sup>21</sup> In Missouri the renunciation must be acknowledged as a deed.<sup>22</sup> In Ohio she must be called before the judge and have the matter explained to her.<sup>23</sup> In Arkansas she must make a regular conveyance to the husband's heirs.<sup>24</sup> Taking and using the property under the will is not an election if she renounce the will within the limited time,<sup>25</sup> provided that she return the devise,<sup>26</sup> and it seems that she be not estopped by the intervention of rights of third parties.<sup>27</sup> So, she may qualify as executrix without destroying her right to renounce the will.<sup>28</sup> If a particular mode of election is specified, as by filing a renunciation of the will, another will not take its place, as suing for dower.<sup>29</sup> And few excuses will prevail, if the time for renunciation has been allowed to go by;<sup>30</sup> thus it is not an excuse that the executor gave erroneous information as to the time for filing the renunciation;<sup>31</sup> or that she was a non-resident;<sup>32</sup> or that she did not know her rights;<sup>33</sup> or that she made a mistake as to the value of the provision of the will;<sup>34</sup> but it is a ground for relief, that she was prevented from filing her renunciation, or made to file it, by misrepresentations of interested parties,<sup>35</sup> unless she had discovered the fraud before the time for renouncing had elapsed;<sup>36</sup> or that she had been unable to ascertain the respective values of her dower and devise,<sup>37</sup> owing, for example,



to pending suits.<sup>38</sup> Under circumstances like this, equity may extend the time within which she must elect.<sup>39</sup> She may renounce conditionally, the renunciation to take effect if an event happens before the expiration of the limited time.<sup>40</sup> The widow must elect in person,<sup>41</sup> she cannot by attorney,<sup>42</sup> except under special statutes;<sup>43</sup> no one can elect for her if she be insane,<sup>44</sup> except by statute;<sup>45</sup> but if she elects while insane, she may ratify her act in a lucid interval.<sup>46</sup> If she dies before electing, her representatives cannot elect for her.<sup>47</sup> If she is an infant, equity will elect for her,<sup>48</sup> or the time for election will be extended till her majority;<sup>49</sup> but where by statute her guardian is authorized to elect, her election in person is void.<sup>50</sup> The practice when a widow has married again before election differs:<sup>51</sup> such cases are rare. When she elects to take under the will, she is a purchaser for valuable consideration,<sup>52</sup> for she gives up dower;<sup>53</sup> and though her rights are inferior to those of creditors, they are superior to those of any other devisee or legatee.<sup>54</sup> and, if the estate is solvent, she is not required to contribute towards the payment of debts.<sup>55</sup> This is the better view, it is said;<sup>56</sup> but it has also been held that she is a creditor and comes against the estate *pari passu* with other creditors;<sup>57</sup> that she comes in ahead of creditors to the extent of the value of her dower;<sup>58</sup> and that she stands in precisely the same position as any other devisee.<sup>59</sup> If she is evicted, she may have dower proportionately, generally.<sup>60</sup> If she renounces the will, the property thus freed is a trust fund for the benefit of the devisees who are disappointed by her taking dower, or if there are none such, for her husband's heirs.<sup>61</sup> A widow's right to dower depends on the law of the place where the lands lie,<sup>62</sup> and the statutory requirements as to election within a specified time apply

properly only to domestic wills.<sup>63</sup> Still it is said that the election should be made in the place where the will is originally probated,<sup>64</sup> in the place of the domicile,<sup>65</sup> and such an election is everywhere binding,<sup>66</sup> which is also denied.<sup>67</sup>

1 Stevens v. Smith, 4 Marsh. J. J. 64; 20 Am. Dec. 205; Mosher, 32 Me. 412; Cass v. Thompson, 1 N. H. 65; 8 Am. Dec. 36; Wilcox v. Randall, 7 Barb. 633; *ante*, § 251.

2 27 Henry VIII. ch. 10, § 9; Co. Litt. 36 b; *ante*, § 273.

3 Parham, 6 Ifulaph. 287, 297; *ante*, §§ 273, 274.

4 Worthen v. Pearson, 33 Ga. 385, 387.

5 1 Bish. M. W. § 430; *ante*, § 267.

6 Rayner v. Capehart, 2 Hawks, 375, 377; *infra*, n. 7

7 Anderson, 36 Pa. St. 476, 496. See Brown v. Cantrell, 62 Ga. 257; Sloan v. Whitaker, 53 Ga. 319; Sewall v. Smith, 54 Ga. 567; Collins v. Woods, 63 Ill. 285; Clay v. Hart, 7 Dana, 1, 6; Smith v. Borie, 7 Bush, 367; Delay v. Vinal, 1 Met. 57; Reed v. Dickerman, 12 Pick. 146; Phelps, 20 Pick. 536; Stark v. Hunton, 1 N. J. Eq. 216; Davison, 15 N. J. L. 235; Thompson v. Hook, 6 Ohio St. 480; Bradfords v. Kents, 43 Pa. St. 474; Custon, 2 Rich. Eq. 1; Wilson v. Hayne, 1 Cheves Eq. 37; Craig v. Walthall, 14 Gratt. 518; Blunt v. Gee, 5 Call, 481; Ambler v. Norton, 4 Hen. & M. 381.

8 Wake, 1 Ves. Jr. 335; Butrick v. Broadhurst, 1 Ves. Jr. 171; Beaulien v. Cardigan, 3 Brown Parl. C. 277; Reynard v. Spence, 4 Beav. 103; *supra*, n. 7.

9 Phelps, 20 Pick. 556. See O'Driscoll v. Koger, 2 Desaus. 295, 299.

10 Dixon v. McCue, 14 Gratt. 540, 564. See Tooke v. Hardeman, 7 Ga. 20; McLaren v. Clark, 62 Ga. 106; Smither, 9 Bush. 231; Grider v. Eubanks, 12 Bush, 510; Milliken v. Wellever, 37 Ohio St. 460; Simon-ton v. Houston, 73 N. C. 408.

11 Reed v. Dickerman, 12 Pick. 146, 151. See Morrison, 2 Dana, 13; Light, 21 Pa. St. 407; Smart v. Waterhouse, 10 Yerg. 94; McDaniel v. Douglas, 6 Humph. 220; Hathaway, 46 Vt. 234.

12 Hall, 2 McCord Eq. 269, 280. See Kldney v. Coursmaker, 12 Ves. Jr. 136, 153; Dillon v. Parker, 1 Swanst. 381 n; U. S. v. Duncan, 4 McLean, 99; Adams, 39 Ala. 274; Steele, 64 Ala. 438, 461; Dabney v. Bailey, 42 Ga. 521; Yandell v. Pugh, 53 Miss. 296; Adsit, 2 Johns. Ch. 448, 451; 7 Am. Dec. 539; Davis, 11 Ohio St. 386; Anderson, 36 Pa. St. 476, 496; Cox v. Rogers, 77 Pa. St. 160; Pinckney, 2 Rich. Eq. 219, 237; Upshaw, 4 Hen. & M. 381, 390, 393.

13 Reaves v. Garrett, 34 Ala. 553; *supra*, notes 11, 12.

14 See statutes cited, *ante*, § 274, n. 29.

15 Hawley v. James, 5 Paige, 318; N. Y. R. S. 1882, p. 2198.

16 Wilson v. Cox, 49 Miss. 538, 542.

17 Atherton v. Corliss, 101 Mass. 40.

18 Sanders, 14 Smedes & M. 81.

19 Del. R. S. 1874, p. 534; Palmer v. Voorhis, 35 Barb. 479.

20 Piercy, 19 Ind. 467.

- 21 Md. R. C. 1878, §§ 226-223; *Hinkley v. House*, 40 Md. 461; 18 Am. Rep. 617; *Durham v. Rhodes*, 23 Md. 233; *Hanson v. Worthington*, 12 Md. 438; *Power v. Jenkins*, 13 Md. 443; *Gough v. Manning*, 26 Md. 348; *Knighton v. Young*, 22 Md. 360; *Chew v. Farmers*, 2 Md. Ch. 232; *Orrick v. Boehm*, 49 Md. 72, 101; *Stew. & Carey H. & W.* pp. 55, 56.
- 22 Mo. R. S. 1879, § 2194.
- 23 Ohio R. S. 1880, § 5365; *Davis*, 11 Ohio St. 386.
- 24 Ark. Dig. 1874, § 2223.
- 25 *McCallister v. Brand*, 11 Mon. B. 370.
- 26 *Steele*, 64 Ala. 438, 461.
- 27 *Tibbits*, 19 Ves. Jr. 663; *English*, 3 N. J. Eq. 504.
- 28 See *McLaren v. Clark*, 62 Ga. 106; *Simonton v. Houston*, 78 N. C. 403.
- 29 *Shaw*, 2 Dana, 341. But see *Rayner v. Capehart*, 2 Hawks, 375, 377; *Cauuffman*, 17 Serg. & R. 16; *Cox v. Rogers*, 77 Pa. St. 160, 166, 167.
- 30 U. S. v. *Duncan*, 4 McLean, 99, 102; *Collins v. Carman*, 5 Md. 504, 532; *Smith*, 20 Vt. 270, 271. See *Adams*, 39 Ala. 274; *Apperson v. Bolton*, 29 Ark. 418, 429, 430; *Stephens v. Gibbes*, 14 Fla. 331; *Nosworthy v. Blizard*, 53 Ga. 663; *Grider v. Eubanks*, 12 Bush, 510; *Shaw*, 2 Dana, 341; *Moore*, 8 Miss. 665; *Grant v. Henly*, 64 Mo. 159, 161-163; *Dougherty v. Barnes*, 64 Mo. 159; *Bierer*, 92 Pa. St. 265; *Morrow*, 3 Tenn. Ch. 532; *Hathaway*, 46 Vt. 234; *Zoggel v. Kuster*, 51 Wis. 31; *Wilber*, 52 Wis. 298.
- 31 *Waterbury v. Netherland*, 6 Heisk. 512.
- 32 *Apperson v. Bolton*, 29 Ark. 418, 429, 430. Or insane: *Collins v. Carman*, 5 Md. 504, 532.
- 33 *Palmer v. Voorhis*, 35 Barb. 479; *Macknet*, 29 N. J. Eq. 54; *Light*, 21 Pa. St. 407.
- 34 *McDaniel v. Douglas*, 6 Humph. 220; *Waterbury v. Netherland*, 6 Heisk. 512.
- 35 *Light*, 21 Pa. St. 407; *supra*, n. 11.
- 36 *Hathaway*, 46 Vt. 234.
- 37 U. S. v. *Duncan*, 4 McLean, 99, 102.
- 38 *Howland v. Heckscher*, 3 Sand. Ch. 519; *Dutch v. Ackerman*, 1 N. J. Eq. 40.
- 39 U. S. v. *Duncan*, 4 McLean, 99, 102; *Smither*, 9 Bush, 231; *Grider v. Eubanks*, 12 Bush, 510.
- 40 *McCallister v. Brand*, 11 Mon. B. 370.
- 41 *Collins v. Carman*, 5 Md. 503, 532; *Boone*, 3 Har. & McH. 95; *Sherman v. Newton*, 6 Gray, 307; *Welch v. Anderson*, 28 Mo. 233; *Lewis*, 7 Ired. 72; *Hinton*, 6 Ired. 274.
- 42 *Hinton*, 6 Ired. 274.
- 43 Del. R. S. 1874, p. 534, § 7; N. C. R. S. p. 840, § 6.
- 44 *Collins v. Carman*, 5 Md. 503, 532. See *Heavenridge v. Nelson*, 56 Ind. 90; *Newcomb*, 13 Bush, 544; 26 Am. Rep. 222; *Pinkerton v. Sargent*, 102 Mass. 563; *Lewis*, 7 Ired. 72; *Kennedy v. Johnston*, 65 Pa. St. 451; 3 Am. Rep. 650; *Wright v. West*, 2 Lea, 78. *Quere*, as to right of equity to elect for her: *Collins v. Carman*, 5 Md. 503, 527.
- 45 N. C. R. S. 1873, p. 840, § 6; Ohio R. S. 1880, § 5964.
- 46 *Brown v. Hodgson*, 31 Me. 65.

47 *Collins v. Carman*, 5 Md. 503, 527. S. P., *Donald v. Porter*, 42 Ala. 99; *Eltzroth v. Binford*, 71 Ind. 455; *Boone*, 3 Har. & McH. 95; *Sherman v. Newton*, 6 Gray, 307; *Milliken v. Welliver*, 37 Ohio St. 460; *Crozier*, 90 Pa. St. 384, 386, 388; 35 Am. Rep. 666. *Contra*, *Howland v. Heckscher*, 3 Sand. Ch. 519.

48 *Addison v. Bowie*, 2 Bland, 606, 623.

49 *Boughton*, 2 Ves. Sr. 12; *Bor*, 3 Brown Parl. C. 173.

50 *Cheshire v. McCoy*, 8 Jones, 376.

51 *Gretton v. Howard*, 1 Swanst. 413; *Putteney v. Darlington*, 7 Brown Parl. C. 515; *Davis v. Page*, 9 Ves. Jr. 350; *Barrow*, 4 Kay & J. 409.

52 *Steele*, 64 Ala. 438, 462; *Lord*, 23 Conn. 327, 330; *Hubbard*, 6 Met. 50, 62; *Tracey v. Murray*, 41 Mich. 109, 111; *Isenhardt v. Brown*, 1 Edw. Ch. 411, 413.

53 Release of dower is a valuable consideration: *Ante*, § 105.

54 *Steele*, 64 Ala. 438, 462; *Isenhardt v. Brown*, 1 Edw. Ch. 411, 413.

55 *Lord*, 23 Conn. 327, 330.

56 *Steele*, 64 Ala. 438, 462. Consult *Norcott v. Gordon*, 14 Sim. 258; *Tevis v. McCreary*, 3 Met. 151; *Dunham v. Rhodes*, 23 Md. 233; *Bowie v. Berry*, 3 Md. Ch. 359; *Hall*, 1 Bland, 203; *Thomas v. Wood*, 1 Md. Ch. 296; *Pollard*, 1 Allen, 490; *Leavenworth v. Cooney*, 48 Barb. 570; *Williamson*, 6 Paige, 298; *Jennings*, 21 Ohio St. 56; *Bard*, 58 Pa. St. 393; *Loockock v. Clarkson*, 1 Desaus. 471; *Stuart v. Carson*, 1 Desaus. 500.

57 *Tracy v. Murray*, 44 Mich. 109, 111.

58 *Gibson v. McCormick*, 10 Gill & J. 65, 113; *Thomas v. Wood*, 1 Md. Ch. 296; *Hall*, 1 Bland, 203; *Gaw v. Huffman*, 12 Gratt. 623, 637.

59 *Chambers v. Davis*, 15 Mon. B. 722; *Brant*, 40 Mo. 266, 267; *Paxson v. Potts*, 3 N. J. Eq. 313; *Howard v. Francis*, 30 N. J. Eq. 444; *Bray v. Neill*, 21 N. J. Eq. 543; *Jennings*, 21 Ohio St. 56.

60 *Hastings v. Clifford*, 32 Me. 132; *Mass. P. S. 1882*, p. 742, § 15; *Thompson v. McGaw*, 1 Met. 66; *Collins v. Carman*, 5 Md. 503, 540; *Wis. R. S. 1878*, § 2173; *ante*, § 273.

61 *Jennings*, 21 Ohio St. 56, 80; *Sandre*, 65 Pa. St. 314, 316. See *Hanson v. Worthington*, 12 Md. 418, 428; *Hinkley v. House*, 40 Ml. 461, 469; 18 Am. Rep. 617.

62 *Jennings*, 21 Ohio St. 56, 76; *ante*, § 248.

63 *Wilson v. Cox*, 49 Miss. 537, 542; *Jennings*, 21 Ohio St. 56, 79, 80. *Contra*, *Apperson v. Bolton*, 29 Ark. 418, 423; *Van Arsdale*, 26 N. J. L. 404, 412.

64 *Wilson v. Cox*, 49 Miss. 538, 545.

65 *Wilson v. Cox*, 49 Miss. 538, 542.

66 *Wilson v. Cox*, 49 Miss. 538, 542.

67 *Apperson v. Bolton*, 29 Ark. 418, 423; *Van Arsdale*, 26 N. J. L. 494, 412.

§ 276. *Estoppel as a bar to dower.*—No act of a married woman during coverture can estop her from setting up her rights to dower,<sup>1</sup> except a release duly executed according to the statute,<sup>2</sup> which estops her as

to all parties holding thereunder.<sup>3</sup> But after her husband's death she may be estopped, for she is *sui juris*.<sup>4</sup> At common law no collateral satisfaction would bar dower,<sup>5</sup> but in equity any provision accepted in lieu of dower did.<sup>6</sup> But it was necessary that the provision should be expressed to be in lieu of dower,<sup>7</sup> or that it should be such an estate in the dower lands as was inconsistent with dower.<sup>8</sup> By statute any devise in lieu of dower, if accepted, is a bar at law.<sup>9</sup> To illustrate: When, in accordance with an arrangement made with her husband before marriage,<sup>10</sup> or during coverture,<sup>11</sup> or with his heirs<sup>12</sup> or a purchaser<sup>13</sup> after his death, the widow accepts a provision instead of dower, she is estopped from afterwards claiming dower; and such an arrangement may be made by parol,<sup>14</sup> provided that such part performance has taken place as will withdraw the case from the operation of the statute of frauds.<sup>15</sup> But if the husband,<sup>16</sup> or purchaser,<sup>17</sup> or heir,<sup>18</sup> as the case may be, has failed to carry out the arrangement, the widow is not barred. Moreover, if the widow stands by and allows the lands of her husband to be sold clear of her dower, she is estopped from afterwards claiming her dower therein;<sup>19</sup> but it is not every sale which she is aware of which renders it her duty to assert her dower, but only such sales as are alleged to be free of dower and with which she is in some way connected.<sup>20</sup> But if she convey her husband's lands as administratrix, she does not thereby estop herself from claiming dower,<sup>21</sup> unless she covenants as to the title,<sup>22</sup> which she is not bound to do,<sup>23</sup> or conveys as individual as well.<sup>21</sup> So, she may in certain cases be estopped by the covenants of an ancestor.<sup>25</sup> So, if she is made a party to a suit, and the property is sold under a decree, and she takes no appeal, she is estopped by the record;<sup>26</sup> though the complainant had

had no right to make her a party at all.<sup>27</sup> But if made party as devisee in partition suit, she is not barred of dower in balance.<sup>28</sup> She is not estopped by accepting funds belonging to her husband,<sup>29</sup> or by spending all the money of his estate.<sup>30</sup>

1 *Worthington v. Middleton*, 6 Dana, 300, 302; *Martin*, 22 Ala. 86; *McFarland v. Febiger*, 7 Ohio, 194, 195; 28 Am. Dec. 632; *ante*, §§ 269, 270; *post*, 409-420. *Contra*, *Connolly v. Branstler*, 3 Bush, 702, 703.

2 *Reiff v. Horst*, 55 Md. 42, 47; *ante*, § 270.

3 *Chicago v. Kinzie*, 49 Ill. 289, 295; *ante*, § 272.

4 *Jones v. Powell*, 6 Johns. Ch. 194, 200; *Stewart M. & D.* § 452.

5 *O'Brien v. Elliott*, 15 Me. 125, 127; 32 Am. Dec. 137. *S. P.*, *Vernon*, 4 Rep. 1, 4; *Conant v. Little*, 1 Pick. 189; *Jones v. Brewer*, 1 Pick. 314; *Keeler v. Tatnell*, 23 N. J. L. 62; *Jones v. Powell*, 6 Johns. Ch. 194, 200.

6 *Mundy*, 2 Ves. Sr. 122; *Stoddard v. Cutcompt*, 41 Iowa, 329, 333; *Warfield v. Castleman*, 5 Mon. 517, 518; *O'Brien v. Elliott*, 15 Me. 125, 127; 32 Am. Dec. 137; *Camden v. Jones*, 23 N. J. Eq. 171, 173; *Jones v. Powell*, 6 Johns. Ch. 144, 200; *Simpson*, 8 Pa. St. 199, 206; *Bullock v. Griffin*, 1 Strob. Eq. 60; *Hunter v. Jones*, 6 Rand. 541, 550; *ante*, §§ 273, 275.

7 *Mitchell v. Ward*, 60 Ga. 525, 531; *O'Brien v. Elliott*, 15 Me. 125, 129; 32 Am. Dec. 137; *ante*, §§ 273, 274.

8 *Park Dow*, 284; 2 *Scribner Dow*, 259; 1 *Roper H. & W.* 259; *Perk.* § 350.

9 *Worthen v. Pearson*, 33 Ga. 385, 387; *ante*, § 274.

10 *Camden v. Jones*, 23 N. J. Eq. 171, 173; *ante*, § 266.

11 *Stoddard v. Cutcompt*, 41 Iowa, 329, 333.

12 *Shotwell v. Sedam*, 3 Ohio, 5, 13.

13 *Simpson*, 8 Pa. St. 199, 206.

14 *Warfield v. Castleman*, 5 Mon. 517, 518; *Shotwell v. Sedam*, 3 Ohio, 5, 13.

15 *Squire v. Harder*, 1 Paige, 494; 19 Am. Dec. 446.

16 *Day v. West*, 2 Edw. Ch. 532, 594. See *Camden v. Jones*, 23 N. J. Eq. 171, 173.

17 *Sargent v. Robert*, 34 Me. 135, 138.

18 *Richart*, 30 Iowa, 465, 468.

19 *O'Brien v. Elliott*, 15 Me. 125, 123; 32 Am. Dec. 137; *Moore v. Tisdale*, 5 Mon. B. 352, 358. See *Ellis v. Diddy*, 1 Cart. 561; *Gatting v. Rodman*, 6 Ind. 289; *Conolly v. Brantsler*, 3 Bush, 702; *Darnall v. Hill*, 12 Gill & J. 388; *Wood v. Seeley*, 32 N. Y. 105; *Smiley v. Wright*, 2 Ohio, 506; *Stoney v. Bank*, 1 Rich. Eq. 275.

20 *Lawrence v. Brown*, 5 N. Y. 394, 401. *S. P.*, *Owen v. Slatter*, 26 Ala. 547; *Wilson v. White*, 2 Dev. Eq. 29; *Smith v. Paysinger*, 2 Mills, 59.

21 *Shurtz v. Thomas*, 8 Pa. St. 359, 362; *ante*, § 272.

22 *Magee v. Mellon*, 23 Miss. 585, 586. See *Dundas v. Hitchcock*, 12 How. 256; *McKee v. Brown*, 43 Ill. 130; *Johnson v. Van Velson*, 43 Mich. 208; *Elmdorf v. Lockwood*, 57 N. Y. 322; *Woodruff v. Cook*, 2 Edw. Ch. 585.

- 23 *Magee v. Mellon*, 23 Miss. 535, 536.
- 24 *Styer*, 21 Pa. St. 86, 89; *Thomas v. Harris*, 43 Pa. St. 231, 233.
- 25 *Towey v. Miner*, 1 Smedes & M. 489; *Russ v. Perry*, 49 N. H. 547.
- Of second husband: *Porter*, 1 R. I. 43.
- 26 *Gardiner v. Miles*, 5 Gill, 94, 100.
- 27 *Lewis v. Smith*, 9 N. Y. 502, 514; *post*, § 280.
- 28 *Walker v. Hall*, 15 Ohio St. 355.
- 29 *O'Brien v. Elliott*, 15 Me. 125 129; 32 Am. Dec. 137.
- 30 *Caruthers v. Wilson*, 1 Smedes & M. 527; *Kennedy v. McAliley*, 9 Rich. 395.

§ 277. **Limitations and laches as bars to dower.**—Until her husband's death a wife has no vested interest in his lands,<sup>1</sup> and therefore in no case can she be barred by an adverse possession against him during coverture.<sup>2</sup> The English Statute of Limitations<sup>3</sup> was held not to apply to dower,<sup>4</sup> because it makes the time run from seisin, and a widow has no seisin until her dower has been assigned.<sup>5</sup> For the same reason and for other reasons, for example, that there is a natural limitation to claims for dower in the widow's death, and no need of statutory limitation;<sup>6</sup> dower has been held without the operation of some statutes in the United States.<sup>7</sup> But other general statutes have been held to include the widow's right to dower,<sup>8</sup> and in many States the statute expressly refers to this right.<sup>9</sup> These statutes are prospectively construed,<sup>10</sup> and are either applied to no right where the husband has died before their passage,<sup>11</sup> or the limited period is made to begin only from the time of their passage.<sup>12</sup> They do not apply, generally, when the wife is beyond seas.<sup>13</sup> It is said, too, that limitations do not run while the heir is in possession and not claiming adversely;<sup>14</sup> and that the widow is barred in any case by adverse possession against the heirs.<sup>15</sup> Limitations must be pleaded to be a bar.<sup>16</sup> Even when Statutes of Limitations have no application, the widow may be barred in equity by laches.<sup>17</sup>

- 1 Moore v. Mayor, 8 N. Y. 110, 113; 59 Am. Dec. 473; *ante*, §§ 260, 263.
- 2 Hart v. McCollum, 28 Ga. 478; Durham v. Angier, 20 Me. 242; Moore v. Frost, 3 N. H. 126.
- 3 32 Henry VIII. ch. 2; 21 James I. ch. 16.
- 4 Park Dow. 311; 2 Scribner Dow. 559.
- 5 Parker v. Obear, 7 Met. 24; Barnard v. Edwards, 4 N. H. 107; 17 Am. Dec. 403; Moore v. Frost, 3 N. H. 126; Guthrie v. Owen, 10 Yerg. 339.
- 6 Conover v. Wright, 6 N. J. Eq. 412; Campbell v. Murphy, 2 Jones Eq. 357.
- 7 Wakeman v. Roache, Dudley, 423; Tooke v. Hardeman, 7 Ga. 20; Chapman v. Shroeder, 10 Ga. 321; Phares v. Walters, 6 Clarke, 106; Rolls v. Hughes, 1 Dana, 407; Wells v. Beall, 2 Gill & J. 468; Riddall v. Trimble, 1 Md. Ch. 143, 150; May v. Rumney, 1 Mich. 1; Littleton v. Patterson, 32 Mo. 357; Brown v. Moore, 74 Mo. 633; Spencer v. Weston, 1 Dev. & B. 213; McMullin v. Turner, 7 Jones, 435; Simonton v. Houston, 78 N. C. 408; *supra*, notes 5, 6.
- 8 Rice v. Nelson, 27 Iowa, 148; Klingsolving v. Pierce, 18 Mon. B. 782; Dunham v. Angier, 20 Me. 242; Torrey v. Minor, 1 Smedes & M. Ch. 489; Conover v. Wright, 6 N. J. Eq. 613; Berrien v. Conover, 16 N. J. L. 107; Jones v. Powell, 6 Johns. Ch. 191; Tuttle v. Wilson, 10 Ohio, 24; Care v. Keller, 77 Pa. St. 487; Allen, 2 Pa. 311; Caston, 2 Rich. Eq. 1; Stoney v. Bank, 1 Rich. Eq. 275.
- 9 Ga. R. C. 1878, § 1764; Mass. P. S. 1882, pp. 742, § 14; N. H. R. S. 1878, pp. 510, 511; N. Y. R. S. 1882, p. 2198.
- 10 *Ante*, §§ 17-20; Martin, 35 Ala. 560; *infra*, notes 11, 12.
- 11 Tooke v. Hardeman, 7 Ga. 20; Sayre v. Wisner, 8 Wend. 651; Ward v. Kilts, 12 Wend. 137.
- 12 Tooke v. Hardeman, 7 Ga. 20.
- 13 Larrowe v. Beam, 10 Ohio, 493.
- 14 Livingston v. Cochran, 33 Ark. 294; Sully v. Nebergill, 30 Iowa, 339; Fetch v. Finch, 52 Iowa, 563; Rickard v. Talbird, Rice Eq. 158.
- 15 Carmichael, 5 Humph. 96.
- 16 Hitchcock v. Harrington, 6 Johns. 290; 5 Am. Dec. 229.
- 17 Banksdale v. Garrett, 64 Ala. 277; McLaren v. Clark, 62 Ga. 106; Robinson v. Miller, 2 Mon. B. 284, 287; Rolls v. Hughes, 1 Dana, 407; Riddall v. Trimble, 1 Md. Ch. 143, 150; Steiger v. Millen, 5 Gill & J. 121; Chew v. Farmers, 9 Gill, 361; Tuttle v. Wilson, 10 Ohio, 24; 2 Scribner Dow. 568.

§ 278. Dedication to public uses, as a bar to dower. — If the husband's property is taken by right of eminent domain, dower is defeated,<sup>1</sup> and the husband's voluntary dedication thereof to public uses has the same effect;<sup>2</sup> so that there is no dower in public streets, parks, libraries,<sup>3</sup> markets,<sup>4</sup> jails, court houses, offices, etc.,<sup>5</sup> or in property condemned for railroads,<sup>6</sup> etc., as



there was none in a castle of old.<sup>7</sup> But when a railroad has bought property instead of taking it by right of eminent domain, dower exists.<sup>8</sup> If the property is taken during coverture and damages are awarded, no allowance will in general be made for the inchoate dower;<sup>9</sup> but if the property is taken after the husband's death, dower will be allowed out of the damages.<sup>10</sup>

1 *Bonner v. Peterson*, 44 Ill. 253, 258; *Duncan v. Terre Haute*, 85 Ind. 104, 196; *French v. Lord*, 69 Me. 537, 541; *Nye v. Taunton*, 113 Mass. 277, 279; *Wheeler v. Kirtland*, 27 N. J. Eq. 534, 536; *Moore v. Mayor*, 8 N. Y. 110, 114; 4 Sand. 456, 460; 59 Am. Dec. 473; *Gwynne v. Cincinnati*, 3 Ohio, 24, 25; 17 Am. Dec. 516; *Weaver v. Gregg*, 6 Ohio St. 547, 549; *Little v. Jones*, 5 Week. Law Gaz. 5, 7.

2 *Gwynne v. Cincinnati*, 3 Ohio, 24, 25; 17 Am. Dec. 516; *Duncan v. Terre Haute*, 85 Ind. 104, 106.

3 1 *Scribner Dow*, 582.

4 *French v. Lord*, 69 Me. 537, 541; *Moore v. Mayor*, 8 N. Y. 110, 114; 59 Am. Dec. 473.

5 *Gwynne v. Cincinnati*, 3 Ohio, 24, 25.

6 *Little v. Jones*, 5 Week. Law Gaz. 5, 7.

7 *Wheeler v. Kirtland*, 27 N. J. Eq. 534, 536.

8 *Nye v. Taunton*, 113 Mass. 277, 279.

9 *French v. Lord*, 69 Me. 537, 541; *Moore v. Mayor*, 8 N. Y. 110, 114; 59 Am. Dec. 473.

10 *Bonner v. Peters*, 44 Ill. 253, 258; *French v. Lord*, 69 Me. 537, 541.

§ 279. Defeat of dower by determination of husband's estate. — When the husband holds or has held a defeasible title, and it is defeated, as where he or his heirs are evicted by title paramount,<sup>1</sup> or a determinable estate, and it is terminated, as a base fee,<sup>2</sup> the wife's dower also terminates,<sup>3</sup> as her estate is but a part or continuation of her husband's;<sup>4</sup> the possible exception to this rule being the case of an estate determinable on a conditional limitation or executory devise.<sup>5</sup>

1 *Toomey v. McLean*, 105 Mass. 122; *ante*, §§ 252, 254.

2 *Jackson v. Kip*, 8 N. J. L. 241; *ante*, § 254.

3 Discussed *ante*, § 254.

4 *Norwood v. Morrow*, 4 Dev. & B. 442, 448; *ante*, §§ 262-264.

5 *Milledge v. Lamar*, 4 Desaus. 617, 627, 645; *ante*, § 254.

II. & W. — 37.

§ 280. **Barring of dower by legal proceedings and sale of the property.**—Whether a married woman has such an interest through her inchoate dower right that she must be a party to any suit respecting the lands in which such right exists, seems to depend not only on the nature of the suit and superiority or inferiority of her right to the right of the suitor, but upon local practice and local statutes.<sup>1</sup> Any sale of her husband's lands during coverture under a lien prior to dower, passes the property clear of dower;<sup>2</sup> and whether she should be made a party, if the suit is in equity, and should have a provision out of the surplus, if any, seems to be disputed,<sup>3</sup> the better opinion being that she should not.<sup>4</sup> A sale during coverture under an inferior lien has no effect on dower;<sup>5</sup> nor can the holder of such a lien drag her into court and have the property sold clear of her dower.<sup>6</sup> After the husband's death the widow should be a party to all suits affecting the lands subject to dower;<sup>7</sup> a sale under a prior lien passes the property clear of dower, but she has dower in the surplus, if the sale be in equity;<sup>8</sup> and no sale under a subsequent lien can affect her dower without her consent.<sup>9</sup> These questions commonly arise in foreclosure suits and in partition suits. In the former, while it is not always necessary it is generally proper to make the wife a party.<sup>10</sup> As to the latter, when the husband institutes partition proceedings it is the better practice to make his wife a party defendant.<sup>11</sup> When the suit is instituted by one of his co-owners, the better opinion is, that the liability to be partitioned is an incident to the estate to which the wife's dower is subject, and that a sale in such a suit defeats dower whether she be a party or not.<sup>12</sup> But, though it is settled that her inchoate dower is not a sufficient estate to base partition proceedings on,<sup>13</sup> in many States the rule is that

she must be made a party or will not be barred.<sup>14</sup> When her husband sues in ejectment he need not join her.<sup>15</sup>

1 Jackson v. Edwards, 7 Paige, 386, 390, 391, 392, 406, 408, 410, 413; 22 Wend. 498. See Goodwin v. Keney, 49 Conn. 563; Anthony v. Nye, 30 Cal. 401; Leonard v. Villars, 23 Ill. 379; Stephens v. Bichnell, 27 Ill. 444; Rank v. Hanna, 6 Ind. 20; Martin v. Noble, 29 Ind. 216; Rissel v. Eaton, 64 Ind. 248; Tisdale v. Risk, 7 Bush, 139; Warren v. Twilley, 10 Md. 39, 51; Chambers v. Nicholson, 30 Md. 349; Johns v. Reardon, 3 Md. Ch. 57; Pritts v. Aldrich, 11 Allen, 39, 40; Lamb v. Montague, 112 Mass. 352, 353; Davis v. Wetherell, 13 Allen, 60, 63; Wisner v. Farnham, 2 Mich. 472; Greiner v. Klein, 23 Mich. 12, 17; Byrne v. Taylor, 46 Miss. 95; Denniston v. Potts, 11 Smedes & M. 36; Thornton v. Pigg, 24 Mo. 249; Reddick v. Walsh, 15 Mo. 513, 538; Worsham v. Collison, 40 Mo. 206; Lee v. Lindell, 22 Mo. 202, 206; Jordan v. Van Epps, 19 Hun, 526; 53 How. Pr. 338; Wilkinson v. Parish, 3 Paige, 65; Denton v. Nanny, 8 Barb. 613, 622; Merchants v. Thompson, 55 N. Y. 7; Mills v. Van Voorhis, 20 N. Y. 412; Trustees v. Roth, 13 N. Y. Weck. Dig. 459; Matthews, 1 Edw. Ch. 555; Rosekrans v. White, 7 Lans. 486, 483; Ripple v. Gilborn, 8 How. Pr. 456, 460; Disbrow v. Folger, 5 Abb. Pr. 53, 54; Riker v. Darky, 4 Edw. Ch. 663, 669; Lewis v. Smith, 11 Barb. 152; 9 N. Y. 502; Raynor, 21 Hun, 36; Ross v. Boardman, 22 Hun, 527, 528; Weaver v. Gregg, 6 Ohio St. 547, 550, 552; Sweesy v. Shady, 22 Ohio St. 333; Ketchum v. Shaw, 23 Ohio St. 503, 506; Parmenter v. Binkley, 23 Ohio St. 32; McArthur v. Franklin, 15 Ohio St. 435; 16 Ohio St. 41; Robinson v. Shacklett, 29 Gratt. 99, 107.

2 Weaver v. Gregg, 6 Ohio St. 547, 552; *ante*, § 258.

3 Compare Vreeland v. Jacobus, 19 N. J. Eq. 231, 232, with Folsom v. Rhodes, 22 Ohio St. 435, 436.

4 Titus v. Neilson, 5 Johns. Ch. 452, 457; *ante*, §§ 253, 261.

5 Combs v. Young, 4 Yerg. 218, 226; 26 Am. Dec. 235; *ante*, § 253.

6 Lewis v. Smith, 11 Barb. 152; 9 N. Y. 502, 514.

7 Holden v. Bagges, 20 W. Va. 62, 74. See Helms v. Love, 41 Ind. 210; Kent v. Taggart, 63 Ind. 163; Blair, 45 Iowa, 42.

8 Mantz v. Buchanan, 1 Md. Ch. 202; *ante*, §§ 258, 261.

9 Gardiner v. Miles, 5 Gill, 94, 100; *ante*, § 276.

10 *Ante*, § 261; Boone Mortgages, § 179.

11 Rosekrans v. White, 7 Lans. 486, 483.

12 Weaver v. Gregg, 6 Ohio St. 547, 552; Lee v. Lindell, 22 Mo. 202, 203.

13 Riker v. Darky, 4 Edw. Ch. 663, 669.

14 Rank v. Hanna, 6 Ind. 20; Greiner v. Klein, 23 Mich. 12, 17; Jackson v. Edwards, 7 Paige, 383, 391, 410, 411; 22 Wend. 498; Van Gelder v. Post, 2 Edw. Ch. 577.

15 Lee v. Lindell, 22 Mo. 202, 205.

§ 281. Defeat of dower by divorce. — A divorce *a mensa et thoro* has no effect on dower, but a divorce *a vinculo matrimonii*, in the absence of statute defeats dower.<sup>1</sup>

1 Discussed Stewart M. & D. § 446.

§ 282. Bankruptcy of husband as bar to dower.—The husband's bankruptcy defeats dower only where his voluntary assignment would.<sup>1</sup> As a rule, therefore, the husband's assignee in bankruptcy takes his lands subject to dower,<sup>2</sup> and has no control over the dower-right.<sup>3</sup> In some States a wife has the same rights on her husband's bankruptcy as on his death.<sup>4</sup>

1 See *Perkins v. McDonald*, 10 Lea, 732, 734; *Rhea v. Meredith*, 6 Lea, 635, 638.

2 *Porter v. Layear*, 109 U. S. 84, 83; 87 Pa. St. 513; 30 Am. Rep. 380; *Dudley v. Easton*, 104 U. S. 93, 105; *Bartenbach*, 11 Bank. Reg. 61; *Angier*, 4 Bank. Reg. 619; *Am. Law Reg. N. S.* 190; *Lawrence*, 41 Conn. 411, 421; *Dwizer v. Garlough*, 31 Ohio St. 158; *Kelso*, 2 Week. Notes, 475; *Speake v. Kinard*, 4 S. C. 54.

3 *Dudley v. Easton*, 104 U. S. 93, 105.

4 *Warford v. Noble*, 9 Biss. C. C. 329, 323; *Lawrence*, 49 Conn. 411, 424.

### ARTICLE III.—ASSIGNMENT OF DOWER.

- § 233. The widow's right to an assignment.
- § 234. Who must assign.
- § 235. Assignment without suit — Of and against common right.
- § 236. Assignment by suit — At common law.
- § 237. Assignment by suit — At law under statutes.
- § 238. Assignment by suit — In equity.
- § 239. Proof of right to dower.
- § 240. Estoppels against defendant.
- § 241. Widow's right to dower in mansion house.
- § 242. Assignment by metes and bounds.
- § 243. Assignment in rents and profits.
- § 244. Assignment in gross sum.
- § 245. Widow's right in improvements.
- § 246. Widow's right to damages in law.
- § 247. Widow's right to account of mesne profits in equity.
- § 248. Effect of assignment.
- § 249. Effect of excessive assignment.
- § 300. Effect of eviction from assigned lands.

§ 283. The widow's right to an assignment of dower.—The right to dower vests on the husband's death,<sup>1</sup> but the widow has no right to enter on her dower lands—no estate in them<sup>2</sup>—until assignment.<sup>3</sup> She may re-

main in the family dwelling until dower is assigned — this is her quarantine;<sup>4</sup> and she has the right to have her dower assigned as soon as practicable, a period being usually fixed by statute.<sup>5</sup>

1 Thornburg, 18 W. Va. 522, 527; *ante*, §§ 251, 262.

2 Blodget v. Brent, 3 Cranch C. C. 394, 396; *ante*, §§ 262, 263.

3 Moore v. Mayor, 8 N. Y. 110, 113, 114; 59 Am. Dec. 473; *ante*, §§ 262-264.

4 Discussed Stewart M. & D. § 459.

5 Consult *post*, §§ 295-297.

§ 234. Who must assign dower. — The tenant of the freehold must assign dower,<sup>1</sup> though sometimes by statute another may, as a tenant for years,<sup>2</sup> or the husband's executor.<sup>3</sup> And whoever is compellable by writ to assign dower may assign it without writ, and *vice versa*.<sup>4</sup> The tenant need not have a good title, his act being ministerial only,<sup>5</sup> and the legal owner will be bound if the assignment were of common right,<sup>6</sup> and be bound till he avoids it, if the assignment were against common right.<sup>7</sup> And the same rule applied to an assignment by a joint tenant.<sup>8</sup> The tenant must assign, though an infant,<sup>9</sup> and a guardian may make the assignment.<sup>10</sup> Of course when the assignment is made by legal proceedings, the sheriff,<sup>11</sup> or other officer of the court makes it.<sup>12</sup>

1 Park Dow. 265, 266; 2 Scribner Dow. 75.

2 R. I. R. S. 1882, p. 637, § 5.

3 Harrow v. Johnson, 3 Met. (Ky.) 578.

4 2 Scribner Dow. 75.

5 Park Dow. 266.

6 2 Scribner Dow. 77; Park Dow. 266. Unless obtained by collusion: Co. Litt. 35 a.; *post*, § 285.

7 Rowe v. Power, 2 Bos. & P. N. S. 1, 33; 2 Scribner Dow. 73.

8 Perk. § 397; 2 Co. 67 a.; 2 Scribner Dow. 79.

9 1 Roll. Abr. 137, 631; Jones v. Brewer, 1 Pick. 314, 317.

10 Boyers v. Newbanks, 2 Cart. 383; Robinson v. Miller, 1 Mon. B. 83; 2 Mon. B. 284; Young v. Tarbell, 37 Me. 509; Curtiss v. Hobart,

11 Me. 230; Jones v. Brewer, 1 Pick. 314, 317. See Mass. P. S. 1882, p. 187, § 31; Wis. R. S. 1873, § 3984. *Contra*, Bonner v. Peterson 44 Ill. 553; Guernsey, 21 Ill. 413.

11 See *post*, § 287.

12 See *Barton v. Hinds*, 46 Me. 121; *Miller*, 12 Mass. 454.

§ 285. **Assignment without suit—Of and against common right.**—The party who is bound to make an assignment of dower<sup>1</sup> may do so without legal proceedings, and such an assignment if fairly made will be as valid as if made under a decree of court.<sup>2</sup> He may either set off to her by metes and bounds one third of the lands and tenements,<sup>3</sup> or, if the husband's interest in the lands be incorporeal one third of his interest,<sup>4</sup> thus giving her exactly what she is entitled to, which is an assignment "of common right."<sup>5</sup> Or he may by an agreement with her set off to some portion of the lands, or some interest in the incorporeal hereditaments, in lieu of what she is really entitled to,<sup>6</sup> this being an assignment "against common right."<sup>7</sup> If the assignment is of common right it is binding though made by a wrongful tenant,<sup>8</sup> the widow holds the property clear of all encumbrances inferior to dower,<sup>9</sup> and, if it be taken from her under prior encumbrances, she may be endowed anew out of the balance of the estate;<sup>10</sup> whereas an assignment against common right is not binding unless made by the rightful tenant,<sup>11</sup> the lands are liable for the husband's debts,<sup>12</sup> and if she is deprived of her enjoyment of them she has no remedy against the balance of the estate.<sup>13</sup> The assignment may be made without writing,<sup>14</sup> for the widow's right is not thereby created but only ascertained.<sup>15</sup> And where the widow and the heir made an agreement as to the division between them of the rents and profits of a mine, such an agreement was deemed an assignment of dower and valid under the statute of frauds.<sup>16</sup> In a case where the assignment is against common right and the widow accepts a provision in lands instead of her

legal dower, the transaction is taken out of the statute of frauds by part performance.<sup>17</sup>

1 *Ante*, § 284.

2 *Hill v. Mitchell*, 5 Ark. 608, 620; *Menifee*, 3 Eng. 9; *Shelton v. Carrol*, 16 Ala. 148; *Johnson v. Neil*, 4 Ala. 166; *Crocker v. Fox*, 1 Root, 227; *Lenfers v. Henke*, 73 Ill. 405; 24 Am. Rep. 263; *McCormick v. Taylor*, 2 Cart. 336, 338; *Robinson v. Miller*, 1 Mon. B. 88; 2 Mon. B. 284; *Mitchell v. Miller*, 6 Dana, 79; *Baker*, 4 Me. 67; *Young v. Tarbell*, 37 Me. 509; *Austin*, 50 Me. 74; *Shattuck v. Gregg*, 23 Pick. 88; *Meserve*, 19 N. H. 240; *Clark v. Mussey*, 43 N. H. 59; *Rutherford v. Graham*, 4 Hun, 796; *McLaughlin*, 20 N. J. Eq. 190; *Sutton v. Burrows*, 2 Murph. 79.

3 *Park Dow*, 251; 2 *Scribner Dow*, 80; 1 *Wash. Real Prop.* 223.

4 2 *Scribner Dow*, 80; *Stevens*, 3 Dana, 371.

5 See also *Schnebly*, 26 Ill. 116; *Pierce v. Williams*, 3 N. J. L. 703.

6 *Johnson v. Neil*, 4 Ala. 166; *Beers v. Strong*, Kirby, 19; 1 Am. Dec. 10; *Robinson v. Miller*, 1 Mon. B. 88; 2 Mon. B. 284; *French v. Peters*, 33 Me. 396; *French v. Pratt*, 27 Me. 381; *Jones v. Brewer*, 1 Pick. 314, 317; *Draper v. Baker*, 12 Cush. 288; *Marshall v. McPherson*, 8 Gill & J. 333; *Welch v. Anderson*, 28 Mo. 223; *Pinkham v. Gear*, 3 N. H. 163; *Hale v. James*, 6 Johns. Ch. 258; 10 Am. Dec. 328; *Fowler v. Griffin*, 3 Sand. 385; *Gown*, 17 S. C. 532; *Fitzhugh*, 3 Call, 13; *ante*, § 276.

7 *Jones v. Brewer*, 1 Pick. 314, 317; *supra*, n. 6.

8 2 *Scribner Dow*, 77; *ante*, § 284.

9 *Scott v. Hancock*, 13 Mass. 162; *ante*, § 258.

10 *Willett v. Beatty*, 12 Mon. B. 172; *Scott v. Hancock*, 13 Mass. 162; *Pierson v. Williams*, 23 Miss. 64.

11 *Rowe v. Power*, 2 Bos. & P. N. S. 1, 33; *ante*, § 284.

12 *French v. Pratt*, 27 Me. 381; *Mantz v. Buchanan*, 1 Md. Ch. 202, 205; *ante*, 253.

13 *Scott v. Hancock*, 13 Mass. 162; *Jones v. Brewer*, 1 Pick. 314; *Hollowman*, 5 Smedes & M. 559.

14 *Rowe v. Power*, 5 Bos. & P. 1, 33; *Johnson v. Neil*, 4 Ala. 166; *Curtis v. Hobart*, 41 Me. 230; *Jones v. Brewer*, 1 Pick. 314; *Meserve*, 19 N. H. 240.

15 *Conant v. Little*, 1 Pick. 191; *Shattuck v. Gregg*, 23 Pick. 183; *Williams v. Bennet*, 4 Ired. 122; *Co. Litt.* 35 a.

16 *Lenfers v. Henke*, 73 Ill. 405; 24 Am. Rep. 263.

17 *Squire v. Harder*, 1 Paige, 494; 19 Am. Dec. 446.

§ 286. **Assignment by suit**—At common law.—The legal remedy at common law to enforce an assignment of dower is by writ of dower *unde nihil habet*, or by writ of right of dower, brought against the tenant of the freehold; upon which if judgment is obtained, dower is assigned by the sheriff, and the widow may then

proceed in ejectment to get possession. Inasmuch as the common law proceedings for dower are almost obsolete—in Mr. Scribner's chapter thereupon not one American case is cited—the discussion thereof is omitted.<sup>1</sup>

1 See 2 Scribner Dow. ch. v.

§ 237. **Assignment by suit—At law under statutes.**—In many States statutes have somewhat modified the common law procedure, and subject to such modifications a writ of dower *unde nihil habet* may still be sued out.<sup>1</sup> One common modification is that demand is a prerequisite to the suit,<sup>2</sup> whereas at common law it was not necessary,<sup>3</sup> except to enable the demandant to recover damages.<sup>4</sup> It is also commonly provided by statute, that where there is no contest, dower may be assigned by the probate court in summary proceedings.<sup>5</sup> But procedure at law for dower is so much a local matter that it will not be discussed herein.

1 See *Layton v. Butler*, 4 Har. (Del.) 507; *Waters v. Gouch*, 6 Marsh. J. J. 536; 22 Am. Dec. 108; *Mass. P. S.* 1882, p. 1023; *Rodgers v. Potter*, 33 N. J. Eq. 73; *Vensel*, 77 Pa. St. 71; 2 Scribner Dow. ch. 6.

2 *Crocker v. Fox*, 1 Root, 227; *Strown*, 50 Ill. 256; *McCracken v. Kuhn*, 73 Ind. 143; *Merrill v. Shattuck*, 51 Me. 370; *Luce v. Stubbs*, 35 Me. 92, 95; *Parker v. Murphy*, 12 Mass. 485; *Davis v. Walker*, 42 N. H. 482; *Stevens v. Reed*, 37 N. H. 49; *Ellis*, 4 R. I. 110.

3 *Hitchcock v. Harrington*, 6 Johns. 295, 296; 5 Am. Dec. 229.

4 Considered *post*, § 296.

5 2 Scribner Dow. ch. 6; 2 Kent, 72; 1 Wash. Real Prop. 226; 1 Hill. Real Prop. 172.

§ 233. **Assignment by suit—In equity.**—Equity first took jurisdiction in assigning dower, in cases where discovery was prayed;<sup>1</sup> and then this jurisdiction was extended generally,<sup>2</sup> principally because dower can be assigned by the same machinery which is used in partition suits and in settling accounts,<sup>3</sup> until it became commonly concurrent with the jurisdiction of law.<sup>4</sup> Where dower in equitable estates is to be awarded,



equity has exclusive jurisdiction.<sup>5</sup> And courts of law are bound to respect an assignment of dower made by a court of equity.<sup>6</sup> The widow may join with the heirs in a suit to have a contract of sale set aside and dower awarded out of the property;<sup>7</sup> but whether she shall join her second husband with her in case she has married again, depends on the local practice.<sup>8</sup> The tenant of the freehold alone is a necessary party,<sup>9</sup> but all interested persons are proper parties;<sup>10</sup> and where dower is to be allowed out of several pieces of property, she may either join all the tenants in one suit or bring a separate suit against each.<sup>11</sup> The husband's administrator need not be a party.<sup>12</sup> The bill should allege substantially the grounds of her right.<sup>13</sup> If her right is admitted, the court will proceed at once to make an assignment,<sup>14</sup> but if it is denied, unless it is a mere equitable right, it must be first established at law,<sup>15</sup> and the practice of equity is to delay the case until this is done.<sup>16</sup> All legal defenses are good,<sup>17</sup> but in case of legal titles no equitable defense will prevail,<sup>18</sup> except that of laches.<sup>19</sup> In England it was a good defense that the tenant was a purchaser for value without notice,<sup>20</sup> but that is not a defense in this country,<sup>21</sup> except where the husband by his sole deed can destroy dower.<sup>22</sup> In case of mere equitable title the rule is different.<sup>23</sup> The assignment may be made by reference either to a master or to commissioners,<sup>24</sup> but in either case the report is not conclusive on the court.<sup>25</sup> The assignment may be made by metes and bounds,<sup>26</sup> or out of the rents and profits.<sup>27</sup> Or, in case of a sale under a prior lien, out of the surplus;<sup>28</sup> and in such cases and other cases where the realty is changed into personalty, a gross sum calculated on the annuity tables may be awarded;<sup>29</sup> in some States this can be done only by the consent of all parties,<sup>30</sup> or the third part may be invested for the

widow to receive the interest during her life.<sup>31</sup> And when the property has been redeemed from a prior encumbrance, the widow may be compelled to contribute proportionally.<sup>32</sup> Costs are within the discretion of the court;<sup>33</sup> when there has been no denial of the widow's right, she should pay the costs;<sup>34</sup> but when the defendants have delayed her or disputed her rights, the costs should be borne by them.<sup>35</sup>

1 Wild v. Wells, 1 Dick. 3; Curtis, 2 Bro. C. C. 620; 2 Scribner Dow. 145; Park Dow. 317, 318.

2 Mundy, 4 Bro. C. C. 294; 2 Ves. Jr. 122; Strickland, 6 Beav. 77, 81.

3 Herbert v. Wren, 7 Cranch, 370.

4 2 Kent Com. 72; Powell v. Monson, 3 Mason, 347, 359; Herbert v. Wren, 7 Cranch, 370; Beavers v. Smith, 11 Ala. 20; Slatter v. Meek, 35 Ala. 528; Boyd v. Hunter 44 Ala. 705; Menifee, 3 Eng. 9; Crittenden, 5 Eng. 333; 6 Eng. 82; Layton v. Butler, 4 Har. (Del.) 507; Farrow, 1 Del. Ch. 457; Milton, 14 Fla. 369; Blair v. Harrison, 11 Ill. 384; Osborne v. Harnie, 17 Ill. 535; Welles v. Sprague, 10 Ind. 305; Martin v. Coult, 4 Ind. 535; Wall v. Hill, 7 Dana, 173; Lawson v. Morton, 6 Dana, 471; Garton v. Bates, 4 Mon. B. 366; Wells v. Beall, 2 Gill & J. 468; Sellman v. Bowen, 8 Gill & J. 50; 29 Am. Dec. 524; Scott v. Crawford, 11 Gill & J. 365; Darnall v. Hill, 12 Gill & J. 388; Grove v. Todd, 45 Md. 232; 20 Am. Rep. 76; Mildred v. Neil, 2 Bland. Ch. 354, 356, 509, 512; Simmons v. Tongue, 3 Bland Ch. 341, 344; Brown v. Bronson, 35 Mich. 415; Davis, 5 Mo. 183; Hartshorne, 2 N. J. Eq. 349; Hinchman v. Stiles, 9 N. J. Eq. 361, 454; Rockwell v. Morgan, 13 N. J. Eq. 119, 384; Ocean v. Brinley, 34 N. J. Eq. 438; Hazen v. Thnrber, 4 Johns. Ch. 604; Swaine v. Perine, 5 Johns. Ch. 482; 9 Am. Dec. 318; Badgley v. Bruce, 4 Paige, 98; Bell v. Mayor, 10 Paige, 49; Campbell v. Murphy, 2 Jones Eq. 357; Whitehead v. Clinch, 1 Murph. 128; Pa. Purd. Dig. 1873, p. 595; Woodward, 2 Rich. Eq. 23; Gibson v. Marshall, 5 Rich. Eq. 254; Miller v. Cape, 1 Desaus. 110; Tenn. R. S. 1871, § 2407; Blair v. Thompson, 11 Gratt. 441.

5 2 Scribner Dow. 161-163.

6 Lawrence v. Miller, 2 Comst. 245.

7 Gray v. Sparrow, 3 Mon. B. 110; Johnson, 1 Munf. 549, 553. *Contra*, Stewart v. Chadwick, 8 Clarke, 463.

8 Potier v. Barclay, 15 Ala. 439; *post*, § 431.

9 Blair v. Thompson, 11 Gratt. 441.

10 Badgley v. Bruce, 4 Paige, 98.

11 Barney v. Frowner, 9 Ala. 901; Marshall v. Anderson, 1 Mon. B. 198; Allen v. McCoy, 8 Ohio, 418, 463; Boyden v. Lancaster, 2 Pat. & H. 198.

12 Campbell v. Murphy, 2 Jones Eq. 357.

13 2 Scribner Dow. 156, 157; Wells v. Sprague, 10 Ind. 305; Wing v. Ayer, 53 Me. 465; Darnall v. Hill, 12 Gill & J. 388; *ante*, § 249.

14 Mundy, 2 Ves. Jr. 122, 129; Scott v. Crawford, 11 Gill & J. 365, 366; Badgley v. Bruce, 4 Paige, 98.

15 *Curtis*, 2 Bro. C. C. 631, 633; *D'Arcy v. Blake*, 2 Schoales & L. 391; *Mundy*, 2 Ves. Jr. 122, 128; *Scott v. Crawford*, 11 Gil & J. 365, 366; *Hartshorne*, 2 N. J. Eq. 349; *Ocean v. Brinley*, 34 N. J. Eq. 438; 1 *Roper Husb. & W.* 450; 2 *Dan. Ch. Pr.* 1165.

16 *Sellman v. Bowen*, 8 Gil & J. 50, 55; 29 *Am. Dec.* 524. See *Barnes v. Carson*, 59 Ala. 188; *Rockwell v. Morgan*, 13 N. J. Eq. 384; *Badgley v. Bruce*, 4 Paige, 98; *supra*, n. 15.

17 2 *Scribner Dow.* 164; *Shares v. Walters*, 6 *Clarke*, 106.

18 *Maybury v. Brlen*, 15 *Peters*, 21; *O'Brien v. Elliott*, 15 *Me.* 125; 32 *Am. Dec.* 137; *Campbell v. Murphy*, 2 *Jones Eq.* 357; 2 *Scribner Dow.* 164.

19 *Rolls v. Hughes*, 1 *Dana*, 407; *ante*, § 277.

20 *Williams v. Lambe*, 3 Bro. C. C. 264; *Walwynn v. Lee*, 9 *Ves. Jr.* 24, 33; *Joyce v. DeMoleyns*, 2 *Jones & L.* 374; *Gomm v. Parrott*, *Com. B. N. S.* 47; 2 *Lead. Cas. Eq. pt. 1*, p. 43.

21 *Dick. v. Doughton*, 1 *Del. Ch.* 320; *Ridgway v. Newbold*, 1 *Har. (Del.)* 385; *Daniell v. Hollingshead*, 16 *Ga.* 190; *Blair v. Harrison*, 11 *Ill.* 384; *Gano v. Gilruth*, 4 *G. Greene*, 453; *Wailes v. Cooper*, 24 *Miss.* 203; *Rankin v. Oliphant*, 9 *Mo.* 230; *Larrowe v. Beam*, 10 *Ohio*, 493; *Reel v. Elder*, 62 *Pa. St.* 303; *Brown v. Wood*, 6 *Rich. Eq.* 155.

22 See *ante*, § 263.

23 *Larrowe v. Beam*, 10 *Ohio*, 493; 2 *Scribner Dow.* 160.

24 2 *Dan. Ch. Pr.* 1166; 2 *Scribner Dow.* 170; *Mundy*, 2 *Ves. Jr.* 122, 129; *Swaine v. Perine*, 5 *Johns. Ch.* 482, 496; 9 *Am. Dec.* 318.

25 *Crittenden*, 5 *Eng.* 333; *Gibson v. Marshall*, 5 *Rich. Eq.* 254.

26 *Gibson v. Marshall*, 5 *Rich. Eq.* 254; *Tod v. Baylor*, 4 *Leigh*, 498; *post*, § 292.

27 *Tod v. Baylor*, 4 *Leigh*, 498; *post*, § 293.

28 *Willett v. Beatty*, 12 *Mon. B.* 172; *Jennison v. Hapgood*, 14 *Pick.* 345; 19 *Am. Dec.* 258; *Hartshorne*, 2 *N. J. Eq.* 349; *Warner v. Van Alstyne*, 3 *Paige*, 573; *Tabele*, 1 *Johns. Ch.* 45; *Titus v. Neilson*, 5 *Johns. Ch.* 452; *Mills v. Van Voorhls*, 23 *Barb.* 125, 126; *Hawley v. James*, 6 *Paige*, 318; *Klutts*, 5 *Jones Eq.* 80; *Thompson v. Cochran*, 7 *Humph.* 72; *ante*, §§ 258, 261.

29 *Brewer v. Van'Arsdale*, 6 *Dana*, 204; *Simonton v. Gray*, 34 *Me.* 50; *Goodburn v. Stevens*, 1 *Md. Ch.* 441; *Jennison v. Hapgood*, 14 *Pick.* 345; 19 *Am. Dec.* 253; *Garland v. Crow*, 2 *Bail.* 24; *post*, § 294.

30 *Herbert v. Wren*, 7 *Cranch*, 370; *Francis v. Garrard*, 19 *Ala.* 794; *Lewis v. James*, 8 *Humph.* 537; *Harrison v. Payne*, 32 *Gratt.* 337; *post*, § 294.

31 *Denton v. Nanny*, 8 *Barb.* 613; *Titus v. Neilson*, 5 *Johns. Ch.* 452.

32 *Carll v. Butman*, 7 *Me.* 102; *House*, 10 *Paige*, 153, 164; 2 *Scribner Dow.* 172.

33 2 *Scribner Dow.* 173.

34 *Lucas v. Calcraft*, 1 Bro. C. C. 134; *Curtis*, 3 Bro. C. C. 620; *Hazen v. Thurber*, 4 *Johns. Ch.* 604; *Swaine v. Perine*, 5 *Johns. Ch.* 483; 9 *Am. Dec.* 318.

35 *Morgan v. Ryder*, 1 *Ves. & B.* 20; *Hall v. James*, 6 *Johns. Ch.* 253; 10 *Am. Dec.* 323; *Russell v. Austin*, 1 *Paige*, 192.

§ 289. Proof of right to dower.—The widow must prove her marriage, and the seisin and death of her hus-

band.<sup>1</sup> The marriage may be proved by cohabitation and repute,<sup>2</sup> and the time thereof, which is sometimes of the utmost importance, may be proved by circumstantial evidence.<sup>3</sup> Nor is strict proof of the husband's death necessary; it may be proved as in other cases.<sup>4</sup> As to seisin, she must make out a *prima facie* case;<sup>5</sup> such a case is made out by proof that the defendant holds under her husband,<sup>6</sup> or that her husband held the property during coverture under claim of title and collected the rents,<sup>7</sup> or by the deed to her husband.<sup>8</sup> If the deed to the defendant from the husband has other parties grantors, it is *prima facie* presumed that the husband was tenant in common only.<sup>9</sup> If the husband obtained the property by descent, the seisin and death of the ancestor and the heirship of the husband must be proved.<sup>10</sup> The identity of the property described in a deed and the property in which dower is claimed, may be proved by parol.<sup>11</sup>

1 See 2 Scribner Dow. 205 *et seq.*; *ante*, § 243.

2 Stewart M. & D. §§ 132, 136; *ante*, § 250.

3 2 Scribner Dow. 212.

4 See Donelly, 8 Mon. B. 113; Kidder v. Blaisdell, 45 Me. 461; Spears v. Burton, 31 Miss. 547; Jackson v. Claw, 18 Johns. 346; Rice v. Lumley, 19 Ohio St. 536; Chapman v. Cooper, 5 Rich. 452; 2 Scribner Dow. 219; Stewart M. & D. §§ 73, 126, 127, 161, 254, 474.

5 Dennis, 7 Blackf. 572; Knight v. Morris, 12 Mo. 41; Ware v. Washington, 6 Smedes & M. 77; Gentry v. Woodson, 10 Mo. 224; Stevens v. Reed, 37 N. H. 40; Forrest v. Trammel, 1 Ball. 77.

6 Carnall v. Wilson, 21 Ark. 62; Griffith, 5 Har. (Del.) 5; Davis v. O'Ferrall, 4 Greene. 358; Wall v. Hill, 7 Dana, 172; Thorndike v. Spear, 31 Me. 91; Kidder v. Blaisdell, 45 Me. 461; May v. Tillman, 1 Mich. 262; Hitchcock v. Harrington, 6 Johns. 200; 5 Am. Dec. 221; Ward v. McIntosh, 12 Ohio St. 231; Pickett v. Lyles, 5 S. C. 275; *post*, § 250.

7 McCullers v. Haines, 39 Ga. 195; Becker v. Quigg, 54 Ill. 390; Mann v. Edson, 39 Me. 25; Torrence v. Casbry, 27 Miss. 607; Randolph v. Dors, 4 Miss. 205; Gentry v. Woodson, 10 Mo. 224; Jackson v. Waltemire, 5 Cowen, 299; Reed v. Stevenson, 3 Rich. 66.

8 Bolster v. Cushman, 34 Me. 423; Carter v. Parker, 28 Mo. 509; Ward v. Fuller, 12 Pick. 155; James v. Rowan, 6 Smedes & M. 303; Griggs v. Smith, 12 N. J. L. 22; Evans, 20 Pa. St. 277.

9 Dashiell v. Collier, 4 Marsh. J. J. 601; Hamblin v. Bank, 19 Me. 68; Doif v. Basset, 15 Johns. 21.

10 Park Dow. 320 n.

11 Keefer v. Young, 2 Har. & J. 52.

§ 290. Estoppel against defendant to deny husband's title.

—When the defendant has accepted a conveyance of the property from the husband of the demandant, the rule seems to be that, if he has no other title at all, he cannot deny the husband's seisin, or set up the title of a third party;<sup>2</sup> but that he can show that the husband's seisin was not sufficient to permit dower to attach,<sup>3</sup> for example, that the husband was a mere trustee,<sup>4</sup> or that the conveyance from the husband did not give him any title, but that he procured the real title from a third party,<sup>5</sup> as where he took a mere quitclaim deed from the husband.<sup>6</sup> Many of the cases carry the estoppel much further, and hold that he cannot deny the husband's title at all,<sup>7</sup> or set up a better title in himself from a third party;<sup>8</sup> but this is objectionable because an estoppel to be effectual must be mutual,<sup>9</sup> and because the estoppel in this case is based on the acceptance of an estate from the husband, and, if the husband's title was not a good one, no estate passed.<sup>10</sup> But no case allows the tenant to deny the husband's title unless he himself holds under a better one.<sup>11</sup> In any case the widow makes out a *prima facie* case by showing that the tenant holds a conveyance from her husband.<sup>12</sup>

1 2 Scribner Dow, 231; Park Dow, 41; Henley v. Webb, 5 Madd. 407; Bancroft v. White, 1 Caines, 185; Chapman v. Shroeder, 10 Ga. 321; Owen v. Robbins, 19 Ill. 545; Davis v. O'Ferrall, 4 Greene, 358; Gully v. Ray, 18 Mon. B. 107; Kimball, 2 Me. 226; Nason v. Allen, 6 Me. 243; Harris v. Gardner, 10 Me. 383; Smith v. Ingalls, 13 Me. 284; Thorndike v. Spear, 31 Me. 91; Lewis v. Meserve, 61 Me. 374; Wedge v. Moore, 6 Cush. 8; May v. Tillman, 1 Mich. 262; Randolph v. Dors, 4 Miss. 205; Thompson v. Boyd, 22 N. J. L. 543; Montgomery v. Bruere, 5 N. J. L. 865; Moore v. Esty, 5 N. H. 479; Jewell v. Harrington, 19 Wend. 471, 474; Brown v. Potter, 17 Wend. 164; Davis v. Barrow, 12 Wend. 65; Sherwood v. Vandenburg, 2 Hill, 203; Hitchcock v. Harrington, 6 Johns. 290; 5 Am. Dec. 229; Norwood v. Morrow, 4 Dev. & B. 442; Love v. Yates, 4 Dev. & B. 364; Shaw v. Galbraith, 7 Pa. St. 111; Pickett v. Lyles, 5 S. C. 275; Pledger v. Ellerbee, 6 Rich. 266; 60 Am. Dec. 123; Gayle v. Price, 5 Rich. 525.

2 Carter v. Hallahan, 61 Ga. 314, 322; Evans, 29 Pa. St. 277.

3 Foster v. Dwinel, 49 Me. 44, 47. S. P., Edmondson v. Welsh, 27 Ala. 578; Shelton v. Carroll, 16 Ala. 145; Edmondson v. Montague, 14

Ala. 370; *Blakeney v. Ferguson*, 20 Ark. 547; *Crittenden*, 6 Eng. 82; *Owen v. Robbins*, 19 Ill. 545; *Gully v. Ray*, 18 Mon. B. 107; *Gammon v. Freeman*, 31 Me. 243, 246; *Small v. Proctor*, 15 Mass. 4.5; *Moore v. Esty*, 5 N. H. 479; *Hutchins v. Carlton*, 19 N. H. 487; *Hill*, 4 Barb. 419, 429; *Averill v. Wilson*, 413 Barb. 189; *Plantt v. Payne*, 2 Bail. 819.

4 *Plantt v. Payne*, 2 Bail. 819.

5 See *Blight v. Rochester*, 7 Wheat. 535; *Dashiel v. Collier*, 4 Marsh. J. J. 601; *Smith v. Ingalls*, 13 Me. 284, 287; *Otis v. Parshley*, 10 N. H. 403; *Sparrow v. Kingman*, 1 Comst. 242; 12 Barb. 201; *Coakley v. Perry*, 3 Ohio St. 344; *Gardner v. Greene*, 5 R. I. 194.

6 *Sparrow v. Kingman*, 1 Comst. 242; *Farpum v. Loomis*, 2 Oreg. 29, 31.

7 *Laboree*, 33 Me. 343; *Brown v. Potter*, 17 Wend. 164; *Jewell v. Harrington*, 19 Wend. 471, 474; *Norwood v. Morrow*, 4 Dev. & B. 442. Consult cases *supra*, n. 1.

8 *Jewell v. Harrington*, 19 Wend. 471, 474; *supra*, n. 7.

9 *Sherwood v. Vandenburg*, 2 Hill, 303; *Osterhort v. Shoemaker*, 3 Hill, 513.

10 *Sparrow v. Kingman*, 12 Barb. 201.

11 *Kidder v. Blaisdell*, 45 Me. 461; *ante*, § 289.

12 *Ante*, § 289, n. 6.

## § 291. The widow's right to dower in the mansion house.

—At common law the widow may remain in the family home or mansion of her husband for forty days after his death, and similar provisions exist in the statutes of many of the States;<sup>1</sup> but there was no right to dower in this property at common law.<sup>2</sup> Such right has been very generally given in the United States,<sup>3</sup> and is especially regarded in the homestead laws.<sup>4</sup>

1 Discussed *Stewart M. & D.* § 459.

2 *Denaugh*, 19 Gratt. 536; *Perk.* § 456.

3 See Ark. Dig. 1874, §§ 2223, 2229; Ill. R. S. 1880, p. 428, § 27.

4 Discussed *post*, §§ 321-330.

§ 292. Assignment by metes and bounds. — Whenever the property in which the widow is entitled to dower is capable of division, dower must be set off by metes and bounds.<sup>1</sup> This was the rule at common law, but its application has proved so troublesome that such assignments are not common, and statutes have provided for other means of giving a widow a fair third for her life.<sup>2</sup> When an assignment by metes and bounds is

about to be made, the tenant need not have notice unless this is required by statute.<sup>3</sup> The officer, sheriff, or commissioners who makes the assignment is a mere ministerial officer,<sup>4</sup> and has no power except such as is given him by the writ;<sup>5</sup> he must strictly conform to the law; he cannot assign a portion of the lands in fee in lieu of dower in the rest,<sup>7</sup> except by the consent of all parties,<sup>8</sup> nor can he give the widow rights of fire-bote, etc., in part of the property not assigned for her dower.<sup>9</sup> His return should report that he has made the assignment by metes and bounds,<sup>10</sup> and should describe with reasonable definiteness the property assigned.<sup>11</sup> If he fails or refuses to act another may be appointed,<sup>12</sup> and if he acts vexatiously or maliciously, as where he chalked off a third of each room in a house,<sup>13</sup> he may be punished.<sup>14</sup> In making the division quantity is not to be considered alone, but the value and productiveness of the land also;<sup>15</sup> and such a proportion of the property should be assigned to the widow as is capable of producing one third as much income as the whole income which the whole property could produce.<sup>16</sup> How far improvements made since the husband's death or alienation are to be included in such estimate is elsewhere discussed.<sup>17</sup> The widow has the right to have one third of each tract assigned, if there are several tracts;<sup>18</sup> but in many States, if the tracts are held by one heir, devisee, or alienee, the whole assignment may be made out of any one tract, for no one could be thereby injured;<sup>19</sup> and there are some cases which hold that the husband's alienee for value without notice has the right to compel an assignment of the whole dower out of the lands given or devised by the husband or descended from him.<sup>20</sup> The assignment need not ordinarily include the dwelling-house,<sup>21</sup> though dower may be assigned in a house by



allowing the demandant certain rooms, with the right to use in common the stairways and halls, etc.<sup>22</sup> If dower exists in leasehold estates by statute, it is assigned just as it is in fees.<sup>23</sup> Dower is assigned in estates in common by metes and bounds if they have been partitioned before the husband's death,<sup>24</sup> or the husband has conveyed his interest to his co-tenant,<sup>25</sup> but otherwise in common.<sup>26</sup> In the case of mines,<sup>27</sup> mills,<sup>28</sup> ferries,<sup>29</sup> etc., assignment by metes and bounds is not practicable, and the widow may be allowed the whole for one third of the time, or one third of the annual rental for her life.<sup>30</sup>

1 *Pierce v. Williams*, 3 N. J. L. 709; *Benner v. Evans*, 3 Pa. 454; *Perk.* ‡ 414; *Park Dow.* 351; 2 *Scribner Dow.* 581; 4 *Kent Com.* 62.

2 See *post*, ‡ 233, and statutes of different States.

3 *Ridgway v. Newbold*, 1 Har. (Del.) 385; *Watkins*, 9 Johns. 245; *Beatty v. Hearst*, 1 McMull. 31. See Ga. R. C. 1878, §§ 4041-4048; R. I. R. S. 1882, p. 638, ‡ 12.

4 1 *Roll. Abr.* 638, pl. 35.

5 *Stewart v. Blease*, 5 S. C. 423; *Moore v. Waller*, 4 Rand. 418.

6 *Durham v. Mulkey*, 59 Ill. 91.

7 *Wilhelm*, 4 Md. Ch. 330; *Simpson v. Alexander*, 6 Cold. 619.

8 *Carriell v. Bronson*, 6 Clarke, 471; *ante*, ‡ 285.

9 *Jones*, Busb. 177.

10 *Pierce v. Williams*, 3 N. J. L. 709; *Jones v. Fields*, 5 Helsk. 394; *Spain v. Adams*, 3 Tenn. Ch. 319; 2 *Scribner Dow.* 582.

11 *Howard v. Cavendish*, Cro. Jac. 621, pl. 12; *Palmer*, 264; 1 *Roper Il. & W.* 394; *Den v. Abingdon*, Doug. 476; *Tenny v. Durrant*, 1 Barn. & Ald. 40; *Adams v. Barron*, 13 Ala. 205; *Myer v. Pfeiffer*, 50 Ill. 485; *Stevens*, 3 Dana, 371; *Young v. Gregory*, 46 Me. 425; *Pierce v. Williams*, 3 N. J. L. 709; *Patch v. Keeler*, 27 Vt. 252.

12 *McCormick v. Taylor*, 5 Ind. 436; *Lenox v. Livingston*, 47 Mo. 256.

13 *Abingdon*, *Palmer*, 265.

14 2 *Scribner Dow.* 582; *Park Dow.* 272.

15 *Coates v. Cheever*, 1 Cowen, 460, 476. S. P., *Scammon v. Campbell*, 75 Ill. 223; *Walker*, 2 Ill. App. 418; *Smith*, 5 Dana, 179; *Lawson v. Morton*, 6 Dana, 471; *Taylor v. Lusk*, 7 Marsh. J. J. 636; *Carter v. Parker*, 28 Me. 509; *Leonard*, 4 Mass. 533; *Riley v. Bates*, 40 Mo. 468; *Strickler*, 66 Mo. 465; *Macknet*, 24 N. J. Eq. 449; *Watkins*, 9 Johns. 245; *McDaniel*, 3 Ired. 61; *Stiner v. Cawthorne*, 4 Dev. & B. 501; *Gillgartner v. Gebhart*, 25 Ohio St. 557; *Gibson v. Marshall*, 6 Rich. Eq. 210.

16 *Conner v. Shepherd*, 15 Mass. 164, 167.

17 *Post*, ‡ 235.



18 Litt. § 36; Hill v. Mitchell, 5 Ark. 608; Morrill v. Meniffee, 5 Ark. 629; Schnebbs, 26 Ill. 116; O'Ferrall v. Simplot, 4 Iowa, 381; Carriell v. Bronson, 6 Clarke, 471; Wood v. Lee, 5 Mon. 50; French v. Pratt, 27 Me. 381; French v. Peters, 33 Me. 396; Jones v. Brewer, 1 Pick. 314; Scott, 1 Bay, 504; 1 Am. Dec. 625.

19 2 Scribner Dow. 603; Doe v. Gwinnell, 1 Q. B. 632; Coulter v. Holland, 2 Har. (Del.) 330; Milton, 14 Fla. 361; Ga. Code 1873, § 1767; Rowland v. Carroll, 81 Ill. 224; Peyton v. Jeffries, 50 Ill. 143; Reeves, 54 Ill. 332; Scammon v. Campbell, 75 Ill. 223; Ky. R. S. 1881, p. 831; Fosdick v. Gooding, 1 Me. 30; 10 Am. Dec. 25; Boyd v. Carlton, 60 Me. 200; Cook v. Fisk, Walk. (Miss.) 423; Thomas v. Hesse, 34 Mo. 13; Ellicott v. Mosier, 11 Barb. 574; Ohio R. S. 1880, § 5710; R. I. R. S. 1882, p. 637; Tenn. R. S. 1871, § 2403; Anderson v. Henderson, 5 W. Va. 182.

20 Grigly v. Cox, 1 Ves. Sr. 517; Lawson v. Morton, 6 Dana, 471; Wood v. Keyes, 6 Paige, 478.

21 Taylor v. Lusk, 7 Marsh. J. J. 636; *ante*, § 291.

22 Palmer, 264; Perk. § 342; Doe v. Gwinnell, 1 Q. B. 632; Lymmes v. Drew, 21 Pick. 278; White v. Story, 2 Hill, 543; Watkins, 9 Johns. 245; Parkes v. Hardey, 4 Bradf. 15; Stewart v. Smith, 29 Barb. 167; Patch v. Keeler, 27 Vt. 252.

23 Rankin v. Oliphant, 9 Mo. 239.

24 Rank v. Hanna, 6 Ind. 20; Lloyd v. Conover, 25 N. J. L. 47.

25 Blossom, 9 Allen, 254.

26 Ridgway v. Newbold, 1 Har. (Del.) 385; Potter v. Wheeler, 13 Mass. 504; Wilkinson v. Parish, 3 Paige, 653; 2 Scribner Dow. 530.

27 Hoby, 1 Vern. 218; 2 Ch. Cas. 160; Stoughton v. Leigh, 1 Taunt. 402; Lenfers v. Henke, 73 Ill. 405; 24 Am. Rep. 263; Moore v. Rollins, 45 Me. 493; Billings v. Taylor, 10 Pick. 400; 20 Am. Dec. 533; Rockwell v. Morgan, 13 N. J. Eq. 384, 389; Coates v. Cheever, 1 Cowen, 490.

28 Hyzer v. Stoker, 3 Mon. B. 117; Smith, 5 Dana, 179.

29 Ferry v. Stevens, 3 Dana, 371.

30 2 Scribner Dow. 531; Park Dow. 253; cases cited *supra*, notes 27-29. See *post*, § 293.

§ 293. Assignment in rents and profits. — Whenever the property is incorporeal,<sup>1</sup> or is in its nature incapable of fair division by metes and bounds,<sup>2</sup> the widow may be allowed one third of the actual or estimated rents and profits during her life.<sup>3</sup> So that although a rent can be given in lieu of dower when the property is divisible, only by consent of all parties,<sup>4</sup> when the property is not divisible but its value consists in its rents and profits as a whole, as in the case of a tavern,<sup>5</sup> a mill,<sup>6</sup> a ferry,<sup>7</sup> a mine,<sup>8</sup> a rent may be given as dower, distrainable of common right.<sup>9</sup> If the property is not actually leased, it is very difficult to determine where its rents and pro-

fits are;<sup>10</sup> the yearly interest on its market value is by no means always commensurate with its actual productive capacity.<sup>11</sup> Generally, one third of the net actual product of the land, whatever that may be, less a fair allowance for the rental of such improvements as the wife is not entitled to dower in,<sup>12</sup> is allowed;<sup>13</sup> but in other cases one third of the legal interest on the estimated market value of the lands, less such part as is derived from trees, etc., thereupon, in which, on account of her liability for waste, a widow has no interest,<sup>14</sup> is allowed.<sup>15</sup> If the lands have been sold under a prior right to dower,<sup>16</sup> as where they have been sold under an antenuptial judgment,<sup>17</sup> or a mortgage prior to dower,<sup>18</sup> or a vendor's lien,<sup>19</sup> or for partnership purposes,<sup>20</sup> or in partition proceedings,<sup>21</sup> and the wife has therefore dower only in the fund otherwise distributable to her husband or his assigns,<sup>22</sup> it is the practice either to allow her a gross sum, or the interest for life on one third.<sup>23</sup> But where she consented to a sale after her husband's death on the understanding that she should be allowed for her dower, it was held that the allowance should be made according to the estimated rents and profits of the lands, and not according to the price brought at the sale.<sup>24</sup>

1 2 Scribner Dow. 639; Park Dow. 253.

2 2 Scribner Dow. 639; Chase, 1 Bland. 206, 233; 17 Am. Dec. 277. Often by statute: Ill. R. S. 1880, p. 428; Me. R. S. 1871, p. 759; Mass. P. S. 1882, p. 742; Mo. R. S. 1879, §§ 2215, 2216; N. H. R. S. 1878, p. 474.

3 Discussed 2 Scribner Dow. 639, *et seq.*; cases cited *infra*.

4 White v. Story, 2 Hill, 543, 549.

5 Chase, 1 Bland, 206, 233; 17 Am. Dec. 277.

6 Smith, 5 Dana, 179; *ante*, § 292.

7 Stevens, 3 Dana, 371; *ante*, § 292.

8 Rockwell v. Morgan, 13 N. J. Eq. 384, 389; *ante*, § 292.

9 Chase, 1 Bland, 206, 233; *ante*, § 292; 17 Am. Dec. 277.

10 See Williams, 3 Bland, 186, 278; 2 Scribner Dow. 639 *et seq.*

11 Williams, 3 Bland, 186, 278, 279; Addison v. Bowle, 2 Bland, 613.

12 Lewis v. James, 8 Humph. 537; *post*, § 295.

13 *Hyzer v. Stoker*, 3 Mon. B. 117; *Williams*, 3 Bland, 186, 242, 243, 278, 229; *Riley v. Clamorgan*, 15 Mo. 331; *Atkins v. Kron*, 8 Ired. Eq. 1; *U. S. v. Dunseth*, 10 Ohio, 18; *Hillgartner v. Gebhart*, 25 Ohio St. 557.

14 *Bishop*, 13 Law J. Ch. N. S. 302; 5 Jur. 931; *Cassonave v. Brooke*, 3 Bland, 267, 263; *Harker v. Christy*, 5 N. J. L. 717.

15 *Beavers v. Smith*, 11 Ala. 20; *Wood v. Morgan*, 56 Ala. 397; *Van Gelder v. Post*, 2 Edw. Ch. 577; *Hale v. James*, 6 Johns. Ch. 253; 10 Am. Dec. 323.

16 See *ante*, §§ 258, 280.

17 *Robbins*, 8 Blackf. 174; *ante*, § 258.

18 *Tabele*, 1 Johns. Ch. 45; *ante*, § 261.

19 *Thompson*, 1 Jones, 430; *ante*, §§ 259, 261.

20 *Goodburn v. Stevens*, 5 Gill, 1; *ante*, §§ 257, 280.

21 *Weaver v. Gregg*, 6 Ohio St. 547, 550, 552; *ante*, § 280.

22 The surplus usually: *Ante*, §§ 257, 261, 280.

23 *Williams*, 3 Bland, 186, 263; citations *supra*, notes 16-21.

24 *Williams*, 3 Bland, 186, 242, 243, 278, 279.

§ 294. Assignment of gross sum in lieu of dower.—When dower is not assigned out of the lands themselves,<sup>1</sup> or out of the actual rents and profits thereof,<sup>2</sup> interest on the estimated value of the proportion which might have been assigned as dower is sometimes given, as have been seen,<sup>3</sup> or the value of the widow's life estate may be calculated and given her at once in a gross sum.<sup>4</sup> This was rarely done in England and the English books contain little on the subject;<sup>5</sup> but it is quite common in the United States.<sup>6</sup> Strictly, a court has no right to award a gross sum in lieu of dower;<sup>7</sup> still, it is said that a court of equity has this right and may exercise its discretion to award a sum in lieu of dower whenever the lands are converted into personalty under its jurisdiction;<sup>8</sup> and this mode of awarding is provided for frequently by statute,<sup>9</sup> and may always be followed by the consent of all parties.<sup>10</sup> It is not infrequent that the parties agree that the widow shall have the value of her dower paid to her in a gross sum, and refer the matter to equity for the sole purpose of having the said value estimated.<sup>11</sup> In estimat-

ing this value, the court considers the chances of life in the widow and the probable value of her life interest.<sup>12</sup> Many different annuity tables have been in use, and rough formula for the determination of the value of dower, an interesting history of which is given in Williams' Case by Chancellor Bland,<sup>13</sup> and which are discussed in many cases,<sup>14</sup> but which cannot be discussed herein.

1 *Ante*, § 292.

2 *Ante*, § 293.

3 *Hale v. James*, 6 Johns. Ch. 255, 260; 10 Am. Dec. 323; *Gove v. Cather*, 24 Ill. 64; *ante*, § 293.

4 *Williams*, 3 Bland, 186, 273, 279; cases cited *infra*.

5 *Mole v. Smith*, 1 Jacob & W. 653.

6 *Williams*, 3 Bland, 186, 264.

7 *Bonner v. Peterson*, 41 Ill. 253.

8 *Brewer v. Van Arsdale*, 6 Dana, 254; *Williams*, 3 Bland, 186, 221; *Dorsey v. Smith*, 7 Har. & J. 353, 363; *Atkins v. Kron*, 8 Ired. Eq. 1.

9 *Higbie v. Westlake*, 14 N. Y. 331; *Mentzer v. Menor*, 8 Watts, 296; *Summers v. Donnell*, 7 Heisk. 565; *Wis. R. S.* 1873, §§ 3514, 3555.

10 *Herbert v. Wren*, 7 Cranch, 370, 380; *Hill v. Mitchell*, 5 Ark. 608; *Francis v. Garrard*, 18 Ala. 794; *Francisco v. Hendricks*, 28 Ill. 64; *Mulford v. Hiers*, 13 N. J. Eq. 13; *McLoughlin*, 20 N. J. Eq. 190; *Mathews v. Durzee*, 45 Barb. 69; *Fulton*, 8 Abb. N. C. 210; *Harrison v. Payne*, 32 Gratt. 387; *Blair v. Thompson*, 11 Gratt. 441.

11 *Sherrard*, 33 Ala. 488; *Smiley*, 1 Dana, 93; *Simonton v. Gray*, 34 Me. 59; *Houghton v. Hapgood*, 13 Pick. 154; *Hazen v. Thurber*, 4 Johns. Ch. 604; *Hale v. James*, 6 Johns. Ch. 263; 10 Am. Dec. 323; *Pollard v. Anderwood*, 4 Hen. & M. 459.

12 2 *Scribner Dow*, ch. 24. For tables, see 2 *Scribner Dow*, Append.; 79 *Ga. Append.*; *Brown v. Bronson*, 35 Mich. 415; *Gravigne v. McGuire's "Dower and Curtesy Tables."*

13 *Williams*, 3 Bland, 186.

14 *Pyle v. Brown*, 6 Ex. 265; *Thistlewood*, 19 Ves. Jr. 250; *Sherard*, 33 Ala. 488; *McHenry v. Yokum*, 27 Ill. 160; *Hazeling v. Hutson*, 18 Ind. 481; *Alexander v. Bradley*, 3 Bush, 667; *Rich*, 7 Bush, 53; *Williams*, 3 Bland, 186, 242, 243; *Md. R. C.* 1878, p. 651; *Dorsey v. Smith*, 7 Har. & J. 363; *Abercrombie v. Riddle*, 3 Md. Ch. 320; *Estabrook v. Hapgood*, 10 Mass. 313, 315; *Brown v. Bronson*, 35 Mich. 415; *Cronkright v. Hanlenbeck*, 25 N. J. Eq. 513, 515; *Mulford v. Hiers*, 13 N. J. Eq. 13; *McLoughlin*, 20 N. J. Eq. 190; *Sauter v. N. Y.* 65 N. Y. 50; *Jackson v. Edwards*, 7 Paige, 386, 403; *Atkins v. Kron*, 8 Ired. Eq. 1; *Shippen*, 80 Pa. St. 391.

§ 295. Widow's right to dower in improvements.—When, before assignment, improvements are made, the widow is entitled to the benefit thereof in case the hus-

band died seized, but not if he had aliened the lands before his death. There seems to be little reason for the distinction, but it exists nearly everywhere.<sup>1</sup>

1. *As against the heir.* As against the husband's heir or devisee, it is well settled that the widow is entitled to dower in the land as it stands when dower is assigned including all<sup>2</sup> improvements;<sup>3</sup> though there are some States where this rule has been changed by statute.<sup>4</sup>

2. *As against the alienee.* As against the husband's alienee, the same rule prevails in England;<sup>5</sup> but in the United States generally,<sup>6</sup> improvements made after the husband has aliened the property are excluded in assigning dower,<sup>7</sup> and either unimproved parts are assigned or less is included in the assignment.<sup>8</sup> This is true whether the improvements have been made before or after the husband's death,<sup>9</sup> whether the alienee have notice of the claim for dower or not,<sup>10</sup> and even in a case where the husband had deeded the property to a relative as a gift and had thereafter made the improvements thereupon himself.<sup>11</sup> A purchaser at execution has in this respect the same rights as a voluntary alienee of the husband's.<sup>12</sup> The value of the property is therefore estimated as of the time of the alienation. The time of the alienation is determined by the date of the deed if an absolute deed;<sup>13</sup> by the date of the passing of the equity of redemption from the husband in case of a mortgage,<sup>14</sup> for the widow has the right to improvements made by the husband after mortgage but before foreclosure;<sup>15</sup> by the date of the bond of conveyance in accordance with which the title has been given.<sup>16</sup> The fact of improvements must be specially pleaded,<sup>17</sup> but not in bar;<sup>18</sup> and the value, etc., thereof may be determined, in accordance with different practice, by the sheriff,<sup>19</sup> or commissioners,<sup>20</sup>

or by an issue before a jury,<sup>21</sup> or by a writ of inquiry.<sup>22</sup>

3. *What are improvements.* Mere repairs are not improvements;<sup>23</sup> but platting the land and preparing it for a depot are;<sup>24</sup> so are crops sown,<sup>25</sup> within the meaning of this section; so is everything added by the money or skill of the alienee;<sup>26</sup> but no improvement in value due to improvement of adjacent lands is,<sup>27</sup> or to the general prosperity,<sup>28</sup> or to accretions,<sup>29</sup> or to any extrinsic cause;<sup>30</sup> though in some States increase of value from whatever cause is regarded as an improvement,<sup>31</sup> within the meaning of this section.

4. *Depreciation.* If the property has diminished in value before assignment, as against the heir, dower is assigned according to its value at the time of the assignment,<sup>32</sup> unless the heir has been guilty of waste, in which case he is liable in damages.<sup>33</sup> But if improvements have burnt down and the heir has received the insurance money, the widow is entitled to a portion thereof.<sup>34</sup> As against the alienee, the value of the land is taken at the time of assignment so far as diminution has been due to natural causes,<sup>35</sup> or to waste before the husband's death;<sup>36</sup> but the widow must be allowed her waste after the husband's death.<sup>37</sup> In New York, however, dower is assigned according to the value of the property at the time of the alienation.<sup>38</sup>

1 Powell v. Monson, 3 Mason, 347, 365-367.

2 Powell v. Monson, 3 Mason, 347, 365, 366; Price v. Hobbs, 47 Md. 359, 386.

3 Price v. Hobbs, 47 Md. 359, 386. S. P., Powell v. Monson, 3 Mason, 347, 365, 366; Way, 42 Conn. 82; Husted, 34 Conn. 488; Raiston, 3 Greene, 531; Chase, 1 Bland, 206, 232; 17 Am. Dec. 277; Walsh v. Wilson, 131 Mass. 535; Catlin v. Ware, 9 Mass. 218, 221; 6 Am. Dec. 56; McGehee, 42 Miss. 747; Humphrey v. Phinney, 2 Johns. 484; Hale v. James, 6 Johns. Ch. 258, 260; 10 Am. Dec. 328; Larrowe v. Beam, 10 Ohio, 498; Thompson v. Morrow, 5 Serg. & R. 289, 290; 9 Am. Dec. 358; Plummer v. Johnson, 15 S. C. 158, 160.

4 See Ky. R. S. 1881, p. 530; N. Y. R. S. 1882, p. 2199; Walker v. Schuyler, 10 Wend. 484.

5 Doe v. Gwinnell, 1 Q. B. 682; 41 Eng. C. L. 728, 735; 2 Scribner Dow. 604; Park Dow. 255.

6 But see Va. Code 1873, p. 855, § 11.

7 Summers v. Babb, 13 Ill. 483, 485. S. P., Powell v. Monson, 3 Mason, 347, 337; Barney v. Frowner, 9 Ala. 901; Beavers v. Smith, 11 Ala. 20; Springle v. Shields, 17 Ala. 235; Francis v. Garrard, 18 Ala. 734; Wood v. Morgan, 56 Ala. 397; Stookey, 89 Ill. 40, 42; Scammon v. Campbell, 75 Ill. 223; Wilson v. Oatman, 2 Blackf. 223; Smith v. Addleman, 5 Blackf. 406; Throp v. Johnson, 3 Ind. 343; Carriell v. Bronson, 6 Clarke, 471; Felch, 52 Iowa, 563, 565; Dashiell v. Collier, 4 Marsh. J. J. 691; Waters v. Gooch, 6 Marsh. J. J. 636; 22 Am. Dec. 103; Taylor v. Brodick, 1 Dana, 345; Mayhoney v. Young, 3 Dana, 583; Lawson v. Morton, 6 Dana, 471; Wall, 7 Dana, 172; Mosher, 15 Me. 371; Hobbs v. Harvey, 16 Me. 80; Carter v. Parker, 23 Me. 509; Manning v. Laborce, 33 Me. 343; Boyd v. Carlton, 61 Me. 200; 31 Am. Rep. 268; Bowie v. Berry, 1 Md. Ch. 452, 454; Price v. Hobbs, 47 Md. 353, 337; Gore v. Brazier, 3 Mass. 523, 543; 3 Am. Dec. 112; Ayer v. Spring, 9 Mass. 8; 10 Mass. 80; Stearns v. Swift, 8 Pick. 562; Johnston v. Van Dyke, 6 McLean, 422; Guerin v. Moore, 25 Minn. 462, 464; McGhee, 42 Miss. 747; Wooldridge v. Wilkins, 4 Miss. 363; Markham v. Merrett, 8 Miss. 437; McClanahan v. Porter, 10 Mo. 746; O'Flaherty v. Sutton, 49 Mo. 583; Cox v. Higbee, 11 N. J. L. 395; Van Don, 3 N. J. L. 513; Johnson v. Perley, 2 N. H. 56, 53; 9 Am. Dec. 35; Hale v. James, 6 Johns. Ch. 258, 260; 10 Am. Dec. 323; Walker v. Schuyler, 10 Wend. 430; Raynor, 21 Hun, 36; Van Gelder v. Post, 2 Edw. Ch. 577; Coates v. Cheever, 1 Cowen, 460; Dolf v. Basset, 15 Johns. 21; Campbell v. Murphy, 2 Jones Eq. 357, 362; Dunseth v. Bank, 6 Ohio, 76; Allen v. McCoy, 8 Ohio, 413; Ohio R. S. 1830, § 5716; Farrowe v. Beam, 10 Ohio, 498; Oreg. G. L. 1874, p. 585; Thompson v. Morrow, 5 Serg. & R. 283, 280; 9 Am. Dec. 353; Shultz, 5 Watts, 255; Winder v. Little, 1 Yeates, 152; Leggett v. Steele, 4 Wash. C. C. 305; Westcott v. Campbell, 11 R. I. 378; Russell v. Gee, 2 Mill. Const. 251; Brown v. Duncan, 4 McCord, 346; Phinney v. Johnson, 15 S. C. 153, 160; Alexander v. Hamilton, 12 S. C. 33; Lewis v. James, 8 Humph. 537; Wis. R. S. 1878, § 2166.

8 See Leggett v. Steele, 4 Wash. C. C. 305; Coates v. Cheever, 1 Cowen, 460.

9 Powell v. Johnson, 3 Mason, 347, 369.

10 Powell v. Johnson, 3 Mason, 347, 369.

11 Stookey, 89 Ill. 40, 42.

12 Price v. Hobbs, 47 Md. 353, 383. S. P., Summers v. Babb, 13 Ill. 483; McClanahan v. Porter, 10 Mo. 746; Ayer v. Spring, 9 Mass. 8.

13 Hale v. James, 6 Johns. Ch. 258, 260; 10 Am. Dec. 323.

14 Hale v. James, 6 Johns. Ch. 258, 260; 10 Am. Dec. 323; *infra*, n. 15.

15 Purrington v. Pierce, 38 Me. 447.

16 Wilson v. Oatman, 2 Blackf. 223.

17 Taylor v. Brodick, 1 Dana, 345; Ayer v. Spring, 10 Miss. 80; Allen v. Smith, 1 Cowen, 181, 135; Humphrey v. Phinney, 2 Johns. 484. But see Yates v. Paddock, 10 Wend. 528; Leonard v. Steele, 4 Barb. 20.

18 Cox v. Higbee, 11 N. J. L. 395.

19 Dolf v. Basset, 15 Johns. 21.

20 Johnson v. Van Dyke, 6 McLean, 422, 430; Cox v. Higbee, 11 N. J. L. 395.

21 Taylor v. Brodick, 1 Dana, 345.



- 22 Dolf v. Basset, 15 Johns. 21.
- 23 Walsh v. Wilson, 131 Mass. 535.
- 24 Felch, 52 Iowa, 563, 565.
- 25 Ralston, 3 Greene, 533.
- 26 Price v. Hobbs, 47 Md. 353, 387; *infra*, n. 30.
- 27 Boyd v. Carlton, 69 Me. 200; 31 Am. Rep. 263.
- 28 Gore v. Brazier, 3 Mass. 523, 544; 3 Am. Rep. 132; *infra*, n. 30.
- 29 Lombard v. Kinzie, 73 Ill. 446; Gale v. Kinzie, 80 Ill. 132.
- 30 Price v. Hobbs, 47 Md. 353, 387. S. P., Powell v. Monson, 3 Mason, 347; Green v. Tennant, 2 Har. (Del.) 336; Summers v. Babb, 13 Ill. 483; Smith v. Addleman, 5 Blackf. 406; Throp v. Johnson, 3 Ind. 343; Carriell v. Bronson, 6 Clarke, 471; Dashiell v. Collier, 4 Marsh. J. J. 691; Taylor v. Brodrick, 1 Dana, 345; Wall v. Hill, 7 Dana, 172; Manning v. Laboree, 33 Mo. 343; Boyd v. Carlton, 69 Me. 250; 31 Am. Rep. 268; Stearns v. Swift, 8 Pick. 532; Johnston v. Van Dyke, 6 McLean, 422; McGehee, 42 Miss. 747; Woolbridge v. Wilkins, 4 Miss. 360; McClanahan v. Porter, 10 Mo. 746; Cox v. Higbee, 11 N. J. L. 395; Campbell v. Murphy, 2 Jones Eq. 357; Allen v. McCoy, 8 Ohio, 418; Thompson v. Morrow, 5 Serg. & R. 230, 230; 9 Am. Dec. 353; Westcott v. Campbell, 11 R. I. 378; Lewis v. James, 8 Humph. 537.
- 31 See Beavers v. Smith, 11 Ala. 20; Francis v. Garrard, 18 Ala. 794; Thrasher v. Pinkard, 23 Ala. 616; Marble v. Lewis, 53 Barb. 432; Dorchester v. Coventry, 11 Johns. 570; Shaw v. White, 13 Johns. 179; Hale v. James, 6 Johns. Ch. 258, 261; 10 Am. Dec. 328; Walker v. Schuyler, 10 Wend. 480; Oreg. G. S. 1874, p. 585; Phinney v. Johnson, 15 S. C. 158; Brown v. Duncan, 4 McCord, 345; Russell v. Gee, 5 Mill. Con. 254; Tod v. Baylor, 4 Leigh. 498; Va. Code 1873, p. 855; Wis. R. S. 1878, § 163.
- 32 Powell v. Monson, 3 Mason, 347, 368; Hale v. James, 6 Johns. Ch. 258, 260; 10 Am. Dec. 328; Campbell v. Murphy, 2 Jones Eq. 357, 362; Westcott v. Campbell, 11 R. I. 378.
- 33 Co. Litt. 32 a.; 2 Scribner Dow. 538.
- 34 Campbell v. Murphy, 2 Jones Eq. 357, 362.
- 35 Thompson v. Morrow, 5 Serg. & R. 230, 231; 9 Am. Dec. 353; *infra*, n. 36.
- 36 Powell v. Monson, 3 Mason, 347, 375; Fritz v. Tudor, 1 Bush, 28; McClanahan v. Foster, 10 Mo. 743; Dunseth v. Bank, 6 Ohio, 76; Thompson v. Morrow, 5 Serg. & R. 230, 231; 9 Am. Dec. 353; Westcott v. Campbell, 11 R. I. 378; Braxton v. Coleman, 5 Call, 433; 2 Am. Dec. 592; 2 Scribner Dow. 635.
- 37 See 2 Scribner Dow. 635; *infra*, n. 36.
- 38 Hale v. James, 6 Johns. Ch. 253; 10 Am. Dec. 328.

§ 296. Widow's right to damages at law.—At common law, no matter how much time elapsed before the assignment of dower, the widow could not recover damages for the detention;<sup>1</sup> but by the statute of Merton,<sup>2</sup> which has been held in force in the United States,<sup>3</sup> she is entitled to the whole value of her dower from the



time of her husband's death to the time of the recovery of the dower;<sup>4</sup> and similar statutes are in force in the United States.<sup>5</sup> Under the statute of Merton the husband must die seized,<sup>6</sup> and there can be no damages against his alienee;<sup>7</sup> but in most States by statute she may recover damages against an alienee from the time of demand of dower.<sup>8</sup> Inasmuch as suits at law for dower have not been discussed in this volume,<sup>9</sup> and inasmuch as the widow has fuller relief in equity than in law,<sup>10</sup> a further discussion of this subject is omitted.

1 Price v. Hobbs, 47 Md. 359, 389. See 2 Scribner Dow. 677; Park Dow. 301; 10 Co. 116; 1 Roper H. & W. 437; Magruder v. Smith, 79 Ky. 512, 513.

2 20 Hen. III. ch. 1; Alex. Brit. Statutes, 20.

3 Alex. Brit. Statutes, 29; Layton v. Butler, 4 Har. (Del.) 507; Darnall v. Hill, 12 Gill & J. 333. Not in South Carolina: Heyward v. Cuthbert, 1 McCord, 386.

4 Co. Litt. 32 b, n. 4; 2 Scribner Dow. 704-707.

5 See Statutes (collected 2 Scribner Dow. 709, 701).

6 The statute so states: See Thym, Style, 67; Beavers v. Smith, 11 Ala. 20; McElroy v. Wathen, 3 Mon. B. 125; Price v. Hobbs, 47 Md. 359, 389.

7 Price v. Hobbs, 47 Md. 359, 389. See 1 Roper H. & W. 440; 2 Scribner Dow. 710; Sellman v. Bowen, 8 Gill & J. 50; 29 Am. Dec. 524; Embree v. Ellis, 2 Johns. 119.

8 See Ill. R. S. 1890, p. 429; Mo. R. S. 1879, § 2206; N. H. G. L. 1873, p. 566; R. I. R. S. 1882, p. 637.

9 Ante, § 286. Discussed 2 Scribner Dow. ch. 25.

10 Price v. Hobbs, 47 Md. 359, 389. See post, § 297.

§ 297. **Widow's right to an account of the mesne profits in equity.**—Equity has full jurisdiction over proceedings for the assignment of dower;<sup>1</sup> and may award mesne profits even when dower has been assigned at law.<sup>2</sup> A judgment at law is conclusive as to the marriage, and as to the seisin and death of the husband;<sup>3</sup> but if it also decides on the merits that the widow is not entitled to mesne profits, this question is also *res adjudicata*.<sup>4</sup> Whether equity will entertain a suit for mesne profits when dower has not been assigned and assignment is not prayed, is doubtful.<sup>5</sup> The widow is entitled

to mesne profits in equity independently of the statute of Merton,<sup>6</sup> and she may recover from the husband's alienee,<sup>7</sup> as well as from the heir or devisee;<sup>8</sup> for a tenant receiving the rents and profits after the husband's death is regarded as a trustee for the widow to the extent of her interest.<sup>9</sup> As against the heir or devisee no demand is necessary,<sup>10</sup> and the heir's alienee stands in the same position as the heir himself,<sup>11</sup> except that in one case he was held liable for profits only from the time of the purchase.<sup>12</sup> As against the husband's alienee, demand is necessary and profits can be recovered only from the date thereof.<sup>13</sup> If the tenant die pending the suit, this does not affect the widow's right to mesne profits;<sup>14</sup> and if she die pending suit, her personal representatives can recover such profits;<sup>15</sup> but if the widow die without instituting suit, it is said in Maryland that her right is gone,<sup>16</sup> though the contrary is elsewhere held.<sup>17</sup> And in one case it is held that if she die pending the suit, her representatives can recover only from the heir, not from the husband's alienee.<sup>18</sup> The mesne profits are the actual profits from the time of demand or the husband's death, as the case may be,<sup>19</sup>—a part of the rent if the property has been leased,<sup>20</sup> a share of the crop,<sup>21</sup> or, if dower is assigned in money, interest on the amount.<sup>22</sup> A release of dower includes a release of rents and profits;<sup>23</sup> and the widow will not be allowed to receive mesne profits if she has occupied the land meanwhile,<sup>24</sup> or has been compensated for the delay in the assignment of dower.<sup>25</sup>

1 Kiddall v. Trimble, 1 Md. Ch. 143, 146; *ante*, § 288.

2 Price v. Hobbs, 47 Md. 359, 389; Bullock v. Griffin, 1 Strob. Eq. 60. But see Whitehead v. Clinch, 1 Murph. 128.

3 Sellman v. Bowen, 8 Gill & J. 50; 29 Am. Dec. 524; Turner v. Morris, 7 Miss. 783.

4 Kiddall v. Trimble, 1 Md. Ch. 143, 148. But see Darnall v. Hill, 12 Gill & J. 388.

5 *Pro*, Harper v. Archer, 28 Miss. 212. *Contra*, Kiddall v. Trimble, 1 Md. Ch. 143, 149, 150.

6 *Keith v. Trapier*, 1 Bail. Eq. 63, 74. But see *Kendall v. Honey*, 5 Mon. 282; *Tod v. Baylor*, 4 Leigh, 498.

7 *Price v. Hobbs*, 47 Md. 359, 399. But see *McElroy v. Wathen*, 3 Mon. B. 135.

8 *Harper v. Archer*, 23 Miss. 212.

9 *Sellman v. Bowen*, 8 Gill & J. 50; 29 Am. Dec. 524.

10 *Slattey v. Meek*, 35 Ala. 523; *Chase*, 1 Bland, 206; 17 Am. Dec. 277; *Darnall v. Hill*, 12 Gill & J. 388; *Johnson v. Thomas*, 2 Paige, 377; *Russell v. Austin*, 1 Paige, 192; *Hazen v. Thurber*, 4 Johns. Ch. 604; *Swaine v. Perine*, 5 Johns. Ch. 482; 9 Am. Dec. 318. *Contra*, *Tod v. Baylor*, 4 Leigh, 498.

11 *Russell v. Austin*, 1 Paige, 192; *Campbell v. Murphy*, 2 Jones Eq. 357.

12 *Russell v. Austin*, 1 Paige, 192.

13 *Price v. Hobbs*, 47 Md. 359, 399; *Steiger v. Hillen*, 5 Gill & J. 121; *Sellman v. Bowen*, 8 Gill & J. 50; 29 Am. Dec. 524; *Chiswell v. Morris*, 15 N. J. Eq. 101; *Tod v. Baylor*, 4 Leigh, 498.

14 *Curtis*, 2 Bro. C. C. 630; *Steiger v. Hillen*, 5 Gill & J. 121; *Park Dow*, 220; 2 *Scribner Dow*, 742. But see *Whitehead v. Clinch*, 1 Murph. 128.

15 *Kiddall v. Trimble*, 1 Md. Ch. 143, 147; *Lindsay v. Gibbon*, 3 Bro. C. C. 495; *Hamilton v. Mohun*, 1 P. Wms. 118, 122; *Magruder v. Smith*, 79 Ky. 512, 515, 517. *Contra*, *Turney v. Smith*, 14 Ill. 242; *Miller v. Woodman*, 14 Ohio, 513.

16 *Kiddall v. Trimble*, 1 Md. Ch. 143, 147.

17 *Harper v. Archer*, 23 Miss. 212; *McLaughlin*, 20 N. J. Eq. 190; *Sandback v. Quigley*, 8 Watts, 460; *Paul*, 36 Pa. St. 270; *Tibbits v. Langley*, 12 S. C. 465.

18 *Johnson v. Thomas*, 2 Paige, 377.

19 *Keith v. Trapier*, 1 Bail. Eq. 63, 71.

20 *Chase*, 1 Bland, 206; 17 Am. Dec. 277.

21 *Darnall v. Hill*, 12 Gill & J. 388, 396.

22 *Keith v. Trapier*, 1 Bail. Eq. 61, 74.

23 *Morrison*, 11 Ill. App. 605.

24 *Springle v. Shields*, 17 Ala. 295; *Smith v. Addleman*, 5 Blackf. 406, 408; *Rackliff v. Look*, 69 Me. 516; *McLaughlin*, 22 N. J. Eq. 505; *Talbot*, 13 R. I. 336.

25 *Woodruff v. Brown*, 17 N. J. L. 246.

§ 298. **Effect of assignment.**—When dower is assigned without suit, fairly and of common right, it satisfies and bars dower;<sup>1</sup> but if the assignment be against common right, it does not avail as a defense for any one not a party or privy to the agreement.<sup>2</sup> When assigned by suit the lands not assigned are freed;<sup>3</sup> but, as if the title to the assigned lands fails, the widow has a right to a new assignment.<sup>4</sup> It is necessary that one

who takes title in lands out of which dower has been assigned should be sure that the widow's title to the lands assigned is good.<sup>5</sup>

1 2 Scribner Dow. 747; *ante*, § 285.

2 Co. Litt. 35 a; 2 Scribner Dow. 747; *ante*, § 276.

3 2 Scribner Dow. ch. 27.

4 *Post*, § 309.

5 Park Dow. 280; 2 Scribner Dow. 750.

§ 299. *Effect of excessive assignment.*—If an assignment has been made without suit by an adult tenant, he can have no relief.<sup>9</sup> If he were an infant, a court of law will grant him a writ of admeasurement of dower,<sup>2</sup> now almost obsolete,<sup>3</sup> unless he has ratified his assignment after coming of age;<sup>4</sup> but he cannot treat his assignment as void and enter against the widow.<sup>5</sup> If the assignment has been made in legal proceedings by the officer of the court, and is defective in that it assigns lands not covered by the judgment, the tenant may recover possession by ejectment;<sup>6</sup> if the assignment has been too great, the tenant may by *scire facias* have an assignment *de novo*,<sup>7</sup> or perhaps equity will set the assignment aside.<sup>8</sup> But though the proper court in which to object to the assignment of dower is the court in which the assignment was made,<sup>9</sup> and the proper time is when the officer has made his return,<sup>10</sup> yet equity will sometimes set aside an assignment made at law,<sup>11</sup> and a petition for a new assignment may in the proper case be filed long after the report of the officer and the ratification thereof,<sup>12</sup> and if it appear that there has been fraud or mistake a new assignment will be ordered.<sup>13</sup> This was done in a case where long after assignment the heirs were ousted by title paramount of the lands set off to them while the widow had received property to which the title was good.<sup>14</sup> But if the widow is deprived of lands once assigned to her in

dower, she must be allowed for the improvements meanwhile put thereupon by her.<sup>15</sup>

1 Stoughton v. Leigh, 1 Taunt. 404, 412; Gilb. Dow. 330; 2 Scribner Dow. 751; 1 Roper H. & W. 407.

2 See McCormick v. Taylor, 2 Cart. (Ind.) 336; Young v. Tarbell, 37 Me. 509.

3 Park Dow. 270.

4 1 Roper H. & W. 407.

5 McCormick v. Taylor, 2 Cart. (Ind.) 336.

6 2 Scribner Dow. 753.

7 Park Dow. 271; 2 Scribner Dow. 754; 1 Roper H. & W. 406, 409.

8 Sneyd, 1 Atk. 442; Park Dow. 272; 1 Roper H. & W. 406.

9 2 Scribner Dow. 755.

10 2 Scribner Dow. 755.

11 See citations *supra*, n. 7.

12 Singleton, 5 Dana, 87.

13 See Chapman v. Shroeder, 10 Ga. 321, 323; Donahue v. Chicago, 57 Ill. 235; Loyd v. Malone, 23 Ill. 43; Cove v. Cather, 23 Ill. 634; Throp v. Johnson, 3 Ind. 343; Singleton, 5 Dana, 87; Rawson v. Clark, 38 Me. 223; Wilhelm, 4 Md. Ch. 330; Stiner v. Cawthorne, 4 Dev. & B. 561; Eagles, 2 Hayw. 181; Shirtz, 5 Watts, 255; Benner v. Evans, 3 Pa. 456, 457; Hawkins v. Hall, 2 Bay, 449; Williams v. Lanneau, 4 2 Strob. 27; Douglass v. McDill, 1 Spear, 139; Gibson v. Marshall, 5 Rich. Eq. 254; Beaty v. Hearst, 1 McMull. 31; Payne, Dud. Eq. 124.

14 Singleton, 5 Dana, 87.

15 Pierson v. Hitchner, 25 N. J. Eq. 129; 2 Scribner Dow. 758.

§ 300. **Effect of eviction from dower.**—When, after dower has been assigned, the widow is evicted and loses her dower, if the assignment were of common right and she had received only what her legal rights entitled her to,<sup>1</sup> she may proceed for a new assignment out of the remainder of the lands subject to dower,<sup>2</sup> just as if no assignment had been made.<sup>3</sup> But it seems that this rule does not apply as against the husband's alienee at common law.<sup>4</sup> If the assignment were against common right and she had agreed to take lands in assignment instead of the lands she was legally entitled to,<sup>5</sup> she had no remedy if evicted.<sup>6</sup> But mere acquiescence in a defective assignment by the sheriff is not an assignment against common right in this con-

nection.<sup>7</sup> This matter has been in many States the subject of legislation.<sup>8</sup>

1 *Ante*, § 285.

2 *French v. Peters*, 33 Me. 396; *French v. Pratt*, 27 Me. 831; *Maniz v. Buchanan*, 1 Md. Ch. 202; *Scott v. Hancock*, 13 Mass. 162, 168; *Jones v. Brewer*, 1 Pick. 314, 317; *Holloman*, 5 Smedes & M. 559; *St. Clair v. Williams*, 7 Ohio, 110; 30 Am. Dec. 194; *Park Dow*. 275; 2 *Scribner Dow*. 761.

3 *French v. Pratt*, 27 Me. 381, 396, 397.

4 *Bedingfield*, 9 Co. 17 *b.*; *Park Dow*. 275

5 *Ante*, § 285.

6 *French v. Pratt*, 27 Me. 381, 396, 397; *Jones v. Brewer*, 1 Pick. 314, 317; 2 *Scribner Dow*. 764; *Park Dow*. 242.

7 *Perk.* § 330; 2 *Scribner Dow*. 764; *Park Dow*. 292.

8 See *Mass. P. S.* 1882, p. 442; *Vt. R. S.* 1880, § 2225; *Wis. R. S.* 1878, § 2173.

## CHAPTER XV.

## WIFE'S ESTATE IN HUSBAND'S PERSONALTY.

## § 301. Generally.

§ 301. Wife's estate in husband's personality, generally. — In some States by statute a wife has dower in leasehold property and other personality, but at common law the wife has during coverture no right in her husband's personality,<sup>2</sup> except her right to have maintenance<sup>3</sup> or alimony<sup>4</sup> out of it, in a proper case, and her right to dispose of it if abandoned.<sup>5</sup> He may give it away and do with it as he pleases if his act takes effect during coverture.<sup>6</sup> But in most States he cannot leave it all away from her by will — she has her thirds.<sup>7</sup>

1 Ark. Dig. 1874, § 2230 ; Mo. R. S. 1879, § 2187 ; *ante*, § 254.

2 Padfield, 78 Ill. 16, 18 ; *Hays v. Henry*, 1 Md. Ch. 337, 340.

3 Discussed Stewart M. & D. § 179.

4 Discussed Stewart M. & D. §§ 383-397.

5 *Rawson v. Spangler*, 18 Cent. Law J. 29, 30 ; Iowa, 1883 ; *ante*, § 90.

6 Padfield, 78 Ill. 16, 19 ; Stewart M. & D. § 462.

7 Discussed Stewart M. & D. § 462.

## CHAPTER XVI.

### ESTATES OF HUSBAND AND WIFE IN PROPERTY OF BOTH OF THEM.

- § 302. Property owned by both before marriage.
- § 303. Property vesting in them after marriage.
- § 304. Tenancy by the entirety at common law — Creation of.
- § 305. Tenancy by the entirety at common law — Property subject to.
- § 306. Tenancy by the entirety at common law — Incidents of.
- § 307. Effect of statutes referring to joint estates.
- § 308. Effect of married women's separate property acts.
- § 309. Effect of divorce.
- § 310. Joint and common estates of husband and wife.
- § 311. Personal property belonging to both.

§ 302. Estates of husband and wife in property owned by them both before marriage. — When two tenants in common or two joint tenants marry, the character of the estate held by them is not changed,<sup>1</sup> though each has in the interest of the other the same estate as he or she would if the other were a tenant in common or a joint tenant with some third party instead of with him or her.<sup>2</sup>

<sup>1</sup> 1 Wash. Real. Prop. 424; Moody, Amb. 649; *Bevine v. Cline*, 21 Ind. 37; *Chandler v. Cheney*, 37 Ind. 391; *Den v. Hardenbergh*, 10 N. J. L. 42, 46; 18 Am. Dec. 371; *McDermott v. French*, 15 N. J. Eq. 78, 80; *Ames v. Norman*, 4 Sneed, 696.

<sup>2</sup> See *ante*, §§ 148, 157, 254.

§ 303. Estates of husband and wife in property vesting in them both during coverture. — Husband and wife are at common law one person,<sup>1</sup> so that when realty<sup>2</sup> or personalty<sup>3</sup> vests in them both equally with a third party, they together take but one share, a moiety, and the third party takes the other moiety.<sup>4</sup> That moiety, or in case the whole property vests in them alone, the whole, they take as one person;<sup>5</sup> "they take but one estate as a corporation would take."<sup>6</sup> In the



case of realty they are seized, not *per my et per tout*, as joint tenants are,<sup>7</sup> but simply *per tout*;<sup>8</sup> both are seized of the whole, and each being thus seized of the entirety, they are called tenants by the entirety, and the estate is an estate by entireties.<sup>9</sup> In the case of personalty there is strictly no tenancy by the entirety,<sup>10</sup> because personal property is not subject to estates at common law,<sup>11</sup> and the husband has the absolute right to the wife's chattels,<sup>12</sup> which right his part ownership of the chattels would not interfere with.<sup>13</sup> But entireties are said to exist in chattels real, etc.<sup>14</sup> In Ohio the common-law estate by entireties has never been recognized, but husband and wife are tenants in common or joint tenants, according to the wording of the instrument through which they hold;<sup>15</sup> so it is in Connecticut.<sup>16</sup> In Kentucky estates by entireties have been expressly abolished by statute,<sup>17</sup> and though the general rule is that such estates continue to exist unless expressly abolished,<sup>18</sup> in some States they have been held to be abolished by statutes referring to joint estates,<sup>19</sup> and by married women's separate property acts.<sup>20</sup> In some States property vesting in husband and wife after marriage is "community property,"<sup>21</sup> and they may also acquire a homestead in most States.<sup>22</sup>

1 *Harding v. Springer*, 14 Me. 407, 408; *ante*, § 39.

2 *Shaw v. Hearsay*, 5 Mass. 521, 523; *infra*, n. 4.

3 *Bricker v. Whalley*, 1 Vern. 233; *ante*, § 302; *infra*, n. 4.

4 Litt. § 291; *Bricker v. Whalley*, 1 Vern. 233; *Back v. Andrews*, 2 Vern. 120; *Wylde*, 2 DeGex, M. & G. 724; *Atcheson*, 11 Beav. 485, 491; 18 Law J. N. S. Ch. 230; *Gordon v. Whieldon*, 18 Law R. N. S. Ch. 5; 11 Beav. 170; *Doe v. Wilson*, 4 Barn. & Ald. 303; *Shaw v. Hearsay*, 5 Mass. 521, 522; *Den v. Hardenbergh*, 10 N. J. L. 42, 45; 18 Am. Dec. 371; *Barber v. Harris*, 15 Wend. 615; *Johnson v. Hart*, 6 Watts & S. 319; 40 Am. Dec. 565. *Contra*, *Warrington*, 2 Hare, 54; *Paine v. Wagner*, 12 Sim. 184.

5 *Den v. Hardenbergh*, 10 N. J. L. 42, 45; 18 Am. Dec. 371; *infra*, n. 9.

6 *Paul v. Campbell*, 7 Yerg. 319; 27 Am. Dec. 508.

7 Topping v. Sadler, 5 Jones, 357 ; *post*, § 307.

8 2 Blackst. Com. 180-182.

9 See Back v. Andrews, 2 Vern. 120 ; Prec. Ch. 1 ; Green v. King, 2 Blackst. 1211 ; Doe v. Parrott, 5 Term, 652 ; Doe v. Wilson, 4 Barn. & Ald. 303 ; Shaver, 31 U. C. Q. B. 605 ; Ins. Co. v. Nelson, 103 U. S. 544 ; Myers v. Reed, 17 Fed. Rep. 401 ; Robinson v. Eagle, 29 Ark. 202 ; Boggs, 54 Ga. 95, 97 ; Maurier v. Saunders, 5 Gilm. 124 ; Lux v. Hoff, 47 Ill. 425, 428 ; Almond v. Bonnell, 76 Ill. 536 ; Cooper, 76 Ill. 57, 64 ; Riggan v. Love, 72 Ill. 553 ; Hulett v. Inlow, 57 Ind. 412 ; 26 Am. Rep. 64 ; Davis v. Clark, 26 Ind. 424 ; Anderson v. Tannerhill, 42 Ind. 141 ; Abshire v. State, 53 Ind. 64, 66 ; McConnell v. Martin, 52 Ind. 434 ; Barnes v. Lloyd, 37 Ind. 523 ; Carver v. Smith, 90 Ind. 215 ; Dodge v. Kinzey, (Ind. 1884), 18 Cent. L. J. 173 ; Hoffman v. Stigers, 28 Iowa, 302, 307 ; Elliott v. Nichols, 4 Bush, 502, 503 ; Banton v. Campbell, 9 Mon. B. 587 ; Cochrane v. Kerney, 9 Bush, 199 ; Moore, 12 Mon. B. 651 ; Harding v. Springer, 14 Me. 407, 408 ; Greenlaw, 13 Me. 186 ; Fladung v. Rose, 58 Md. 13, 24 ; Marburg v. Cole, 49 Md. 402, 413 ; 33 Am. Rep. 266 ; Craft v. Wilcox, 4 Gill, 504 ; Brinton v. Hook, 3 Md. Ch. 477 ; Lowell, 22 Pick. 215, 221 ; Shaw v. Hearsay, 5 Mass. 521, 523 ; Kennedy, 119 Mass. 211 ; Abbott, 97 Mass. 136 ; Water v. Coffin, 13 Allen, 217 ; Fox v. Fletcher, 8 Mass. 274 ; Varnum v. Abbott, 12 Mass. 474, 479 ; Fisher v. Rovin, 25 Mich. 347 ; Jacobs v. Miller, 50 Mich. 119 ; Wart v. Bovee, 35 Mich. 425, 428 ; Hemingway v. Scales, 42 Miss. 1 ; 2 Am. Rep. 586 ; Duff v. Beauchamp, 50 Miss. 531 ; Allen v. Tate, 58 Miss. 585 ; Gilson v. Zimmerman, 12 Miss. 385 ; Hali v. Stephens, 65 Mo. 670 ; 27 Am. Rep. 302 ; Garner v. Jones, 52 Mo. 68 ; Thornton v. Exchange, 71 Mo. 221 ; Wentworth v. Remick, 47 N. H. 226 ; Carter v. Beals, 44 N. H. 407 ; Brown v. Gale, 5 N. H. 416 ; Clark, 56 N. H. 105, 110 ; Lee v. Zabriskee, 28 N. J. Eq. 422, 428, notes ; 35 N. J. Eq. 135, 136, notes ; Bolles v. Trust, 27 N. J. Eq. 308 ; Den v. Hardenbergh, 10 N. J. L. 42, 45 ; 18 Am. Dec. 371 ; Den v. Gardner, 20 N. J. L. 556, 562 ; Kipp, 33 N. J. Eq. 213 ; Thomas v. De Baum, 14 N. J. Eq. 37, 40 ; McDermott v. French, 15 N. J. Eq. 78, 80 ; Bertles v. Noonan, 92 N. Y. 152 ; 44 Am. Rep. 361 ; Meeker v. Wright, 76 N. Y. 262 ; Wright v. Sadler, 20 N. Y. 320, 323 ; Torrey, 14 N. Y. 430 ; Farmers' v. Mechanics', 49 Barb. 162 ; Miller, 9 Abb. Pr. N. S. 444 ; Baker v. Lamb, 18 N. Y. Supr. 519 ; Jones v. Potter, 89 N. C. 220, 222 ; McCurdy v. Canning, 61 Pa. St. 39, 40 ; French v. Neehan, 56 Pa. St. 286 ; Bales v. Seely, 46 Pa. St. 248 ; Clark v. Thompson, 12 Pa. St. 274 ; Stuckey v. Keefe, 26 Pa. St. 397 ; Gillan v. Dixon, 65 Pa. St. 395 ; Tupper v. Fuller, 7 Rich. Eq. 170 ; Bomar v. Mullins, 4 Rich. Eq. 80 ; Ames v. Norman, 4 Sneed, 692 ; Berrigan v. Fleming, 2 Lea, 271 ; Taul v. Campbell, 7 Verg. 319 ; 27 Am. Dec. 508 ; Thornton, 3 Rand. 179 ; Brownson v. Hull, 16 Vt. 309 ; Ketchum v. Walsworth, 5 Wis. 95 ; Allie v. Schmetz, 17 Wis. 169 ; Bennett v. Child, 19 Wis. 364. Cases collected : 18 Cent. L. J. 183, 236, 326 ; 28 N. J. Eq. 422, notes ; 35 N. J. Eq. 135, notes.

10 Wart v. Bovee, 35 Mich. 425, 428 ; *post*, § 311.

11 Discussed *ante*, § 136.

12 Discussed *ante*, §§ 163-183 ; *post*, § 311.

13 Atcheson, 11 Beav. 485, 491 ; Polk v. Allen, 19 Mo. 467, 468 ; *post*, § 311.

14 2 Preston on Abstracts, 39 ; *post*, § 305.

15 Sergeant v. Steinberger, 2 Ohio, 305 ; 15 Am. Dec. 553 ; Wilson v. Fleming, 13 Ohio, 68 ; Penn v. Cox, 16 Ohio, 30.

16 Whittlesey, 11 Conn. 340 ; Taylor v. Knapp, 25 Conn. 513.

17 Elliott v. Nicholls, 4 Bush, 502, 503.

18 Marburg v. Cole, 49 Md. 402, 413 ; 33 Am. Rep. 266 ; *post*, § 308.

19 *Hoffman v. Stigers*, 23 Iowa, 302, 307; *post*, § 307.

20 *Clark*, 56 N. H. 105, 110; *post*, 303.

21 Discussed *post*, §§ 312, 313.

22 *Barber v. Babel*, 36 Cal. 16; *Chase v. Abbott*, 20 Iowa, 151. Discussed *post*, §§ 320-330.

§ 304. **Tenancy by entireties, creation of.**—Estates by entireties may be created by will,<sup>1</sup> by instrument of gift or purchase,<sup>2</sup> and even by inheritance;<sup>3</sup> nor need the man and woman be husband and wife at the time the instrument is executed or the descent is cast, if only they be married at the time the estate vests.<sup>4</sup> There is no question but that words vesting the property in husband and wife without qualification and without even referring to them as husband and wife,<sup>5</sup> create an estate by entireties;<sup>6</sup> but though it is constantly said the same words which would vest an estate in common or a joint estate in other persons vest an entirety in the husband and wife,<sup>7</sup> and that a deed to them as joint tenants,<sup>8</sup> or as tenants in common,<sup>9</sup> is simply a solecism, their relation preventing any estate but one by entirety arising in them,<sup>10</sup> it is acknowledged that they may hold property vesting in them before marriage as tenants in common, etc.;<sup>11</sup> and the prevailing view is that, especially under modern statutes, they may, by express words, be made joint tenants or tenants in common.<sup>12</sup> And there are cases where the husband is joined with the wife simply as trustee,<sup>13</sup> or where one of the parties has some special estate inconsistent with a tenancy by entireties<sup>14</sup> in which this estate does not exist. If two persons are described as husband and wife, an estate by entireties is created whether they are validly married or not.<sup>15</sup>

1 1 Preston Estates, 131.

2 2 Blackst. Com. 182.

3 *Gillan v. Dixon*, 65 Pa. St. 395.

4 See Jickling, Legal & Eq. Estates, 252; Nicholls, Vin. Abr. Baron et Feme; Co. Litt. 187; Plowd. Comm. 483; Freeman on Co-tenancy, § 63.

5 Chandler v. Cheney, 37 Ind. 391; 1 Wash. Real Prop. 577.

6 Marburg v. Cole, 49 Md. 402, 412; 33 Am. Rep. 266; Hamm v. Meisenhelter, 9 Watts, 350; *ante*, § 303, n. 9.

7 Den v. Hardenbergh, 10 N. J. L. 42, 45; 18 Am. Dec. 371. See Green v. King, 2 Black, W. 1213; Doe v. Parrott, 5 Term Rep. 652; Farmers v. Gregory, 49 Barb. 155; Goelet v. Gori, 31 Barb. 314; Stucky v. Keefe, 26 Pa. St. 397; Martin v. Jackson, 26 Pa. St. 504; *ante*, § 303, n. 9.

8 Pollock v. Kelley, 6 I. R. C. L. 267.

9 Brun v. Glover, 1 Ho. F. Ch. 71.

10 See Clark, 56 N. H. 105, 110; *post*, § 308.

11 Den v. Hardenbergh, 10 N. J. L. 42, 45; 13 Am. Dec. 271 *ante*, § 302; *post*, § 310.

12 Fladung v. Rose, 53 Md. 13, 22-25; *post*, § 310.

13 See Moore, 12 Mon. B. 634; Babbitt v. Scroggin, 1 Duval, 273; *ante*, § 132.

14 See Edwards v. Beall, 75 Ind. 401.

15 Jacobs v. Miller, 50 Mich. 119, 125.

§ 305. Tenancy by entirety at common law.—Property subject to.—A tenancy by entireties may exist in an estate “in fee, in tail, for life,<sup>1</sup> or for years, or other chattels real.”<sup>2</sup> It may exist in an estate in possession, remainder, or reversion;<sup>3</sup> in legal or equitable estates;<sup>4</sup> in a customary estate;<sup>5</sup> in a copyhold estate;<sup>6</sup> and in incorporeal as well as corporeal property.<sup>7</sup> Properly speaking, personalty cannot be held by the entirety.<sup>8</sup>

1 Jones v. Potter, 89 N. C. 220, 222.

2 2 Preston on Abstracts, 39; Wiscot, 2 Co. 60; 5 Bac. Abr. 244; Downing v. Seymour, Cro. Eliz. 912.

3 Purefoy v. Rogers, 2 Saund. 382.

4 See Norman v. Cunningham, 5 Gratt. 70.

5 Glaister v. Hewer, 8 Ves. 195.

6 Doe v. Parrott, 5 Term. Rep. 652.

7 See Kingdom v. Bridges, 2 Vern. 56.

8 Abshire v. State, 53 Ind. 64, 65; *post*, § 311.

§ 306. Estates by entireties—Incidents of.—The essential characteristics of estates by entireties are: each tenant is seized of the whole;<sup>1</sup> the estate is inseverable

— cannot be partitioned ;<sup>2</sup> neither husband nor wife can alone affect the inheritance — the survivor's right to the whole ;<sup>3</sup> the alienation by one of the tenants does not change the nature of the estate, as with joint estates ;<sup>4</sup> on the death of either, the other has the whole estate,<sup>5</sup> continuing alone his or her former holding, and not taking by survivorship in the sense that a surviving joint tenant does ;<sup>6</sup> on absolute divorce they become tenants in common or joint tenants ;<sup>7</sup> both may assign the inheritance absolutely or by way or mortgage,<sup>8</sup> although in Indiana, under a statute forbidding contracts of married women as sureties, a mortgage of the estate for a debt of the husband was held void as to the wife ;<sup>9</sup> they may divide it by consent,<sup>10</sup> and sometimes statutes expressly authorize partition proceedings.<sup>11</sup> During coverture, the husband has at common law his estate *jure uxoris*,<sup>12</sup> with the right to the rents and profits ;<sup>13</sup> he holds the property subject to his control, use, and possession ;<sup>14</sup> only this estate for their joint lives can be aliened by him,<sup>15</sup> or taken for his debts,<sup>16</sup> or charged by him with a mechanic's lien.<sup>17</sup> This estate of the husband during coverture has probably been abolished by separate property acts, even where these acts are held not to destroy estates by entireties.<sup>18</sup> If husband conveys and survives he is bound.<sup>19</sup>

1 Bertles v. Noonan, 92 N. Y. 152, 156 ; 44 Am. Rep. 361 ; ante, § 303.

2 McCurdy v. Canning, 6 Pa. St. 33, 40. S. P., Baggs, 54 Ga. 95, 97 ; Chandler v. Cheney, 37 Ind. 391 ; Hoffman v. Stigers, 23 Iowa, 302 ; Elliott v. Nichols, 4 Bush, 502, 505 ; Marburg v. Cole, 49 Md. 402, 411 ; 33 Am. Rep. 266 ; Frizzle v. Bozier, 19 Mo. 468 ; Den v. Hardenbergh, 10 N. J. L. 42, 45 ; 18 Am. Dec. 371 ; Den v. Gardner, 20 N. J. L. 556, 562 ; Moore, 47 N. Y. 463 ; 7 Am. Rep. 466 ; Miller, 9 Abb. Pr. N. S. 443 ; Thornton, 3 Rand. 179 ; Bennett v. Child, 19 Wis. 362, 365.

3 Hemingway v. Scales, 46 Miss. 1, 17 ; 2 Am. Rep. 586 ; Den v. Hardenbergh, 10 N. J. L. 42, 45 ; 18 Am. Dec. 371 ; McDermott v. French, 15 N. J. Eq. 78, 80 ; Farmers v. Gregory, 49 Barb. 155, 162 ; Dias v. Glover, 1 Hoff. Ch. 71, 76 ; Torrey, 14 N. Y. 430, 432 ; Bennett v. Child, 19 Wis. 362, 365.

4 Shaw v. Hearsay, 5 Mass. 521, 522

II. & W. — 40.

5 *Marbourg v. Cole*, 49 Md. 402, 411; 33 Am. Rep. 266. S. P., *Myers v. Reed*, 17 Fed. Rep. 401, 403; *McDermott v. French*, 15 N. J. Eq. 78, 80; *Den v. Hardenbergh*, 10 N. J. L. 42, 46; 13 Am. Rep. 371; *Dias v. Glover*, 1 Hoff. Ch. 71, 76; *Bertles v. Noonan*, 92 N. Y. 152, 156; 44 Am. Rep. 361; *French v. Mehan*, 56 Pa. St. 286, 289.

6 *Washburn v. Burns*, 34 N. J. L. 18, 19, 20. S. P., 2 Blackst. Com. 182; *Hoffman v. Stigers*, 23 Iowa, 302, 306; *supra*, n. 5.

7 Discussed *post*, § 309.

8 *McDuff v. Beauchamp*, 50 Miss. 531, 536; *Thomas v. DeBaum*, 14 N. J. Eq. 37, 40.

9 *Dodge v. Kinzy* (Ind. 1834), 18 Cent. L. J. 173, 238.

10 *Washburn v. Burns*, 34 N. J. L. 18, 19.

11 *Bertles v. Noonan*, 92 N. Y. 152, 160; 44 Am. Rep. 361.

12 *Hemingway v. Scales*, 42 Miss. 1, 16; 2 Am. Rep. 586; *Hall v. Stephens*, 65 Mo. 670, 679; 27 Am. Rep. 302; *Washburn v. Burns*, 34 N. J. L. 18, 20; *Farmers v. Gregory*, 49 Barb. 155, 162; *Bertles v. Noonan*, 92 N. Y. 152, 156; 44 Am. Rep. 361; *Bennett v. Child*, 19 Wis. 362, 365; *ante*, §§ 146-150.

13 *Farmers v. Gregory*, 49 Barb. 155, 162; *supra*, n. 12.

14 *Bertles v. Noonan*, 92 N. Y. 152, 156; 44 Am. Rep. 361; *supra* n. 12.

16 *Bennett v. Child*, 19 Wis. 362, 365. See *Whedon v. Gorham*, 30 Conn. 408; *Almond v. Bonnell*, 76 Ill. 536; *Chandler v. Cheney*, 37 Ind. 391; *Davis v. Clark*, 26 Ind. 424; *McTighe v. Bringham*, 42 Iowa, 455; *Cochran v. Kerney*, 9 Bush, 199; *Garner v. Jones*, 52 Mo. 68; *Brown v. Gale*, 5 N. H. 416; *Carter v. Beals*, 44 N. H. 407; *Thomas v. DeBaum*, 14 N. J. Eq. 37, 40; *Jackson v. McConnell*, 19 Wend. 175, 178; *Gentry v. Wagstaff*, 3 Dev. 270; *Stoebler v. Knerr*, 5 Watts, 181; *French v. Mehan*, 56 Pa. St. 286; *Ames v. Norman*, 4 Sneed, 683, 697; *Roanes v. Archer*, 4 Leigh, 550; *Brownson v. Hill*, 16 Vt. 309; *Howe v. Blanden*, 21 Vt. 315; *Bennett v. Child*, 19 Wis. 362.

17 *Washburn v. Burns*, 34 N. J. L. 18, 20.

18 *McClurg v. Canning*, 64 Pa. St. 39, 41; *post*, § 308.

19 *Kip*, 33 N. J. Eq. 213, 216. S. P., *Wales v. Coffin*, 13 Allen, 213; *Shroyer v. Wickell*, 55 Mo. 264; *Berrigan v. Fleming*, 2 Lea, 271, 275.

15 *Den v. Gardner*, 20 N. J. L. 556, 560; *supra*, n. 12; *infra*, n. 19.

§ 307. Effect of statutes referring to joint tenancies upon tenancies by entireties.—Statutes providing that a deed to one or more persons shall not, as it did at common law, create a joint tenancy, but shall create a tenancy in common, unless it expressly creates a different one, have no application to tenancies by entireties,<sup>1</sup> because husband and wife are one person,<sup>2</sup> because a joint estate is not an estate by the entirety,<sup>3</sup> and because a general act will not modify the special law of husband

and wife unless it expressly so provides.<sup>4</sup> In a few States a contrary rule prevails.<sup>5</sup>

1 Robinson v. Eagle, 23 Ark. 202, 206; Arnold, 30 Ind. 305, 306; Lowell, 22 Pick. 215, 221; Shaw v. Hearsay, 5 Mass. 521, 523; Fladung v. Rose, 53 Md. 13, 20; Marburg v. Cole, 49 Md. 402, 412; 33 Am. Rep. 266; McDuff v. Beauchamp, 50 Miss. 531, 525; Hemingway v. Scales, 42 Miss. 1, 17; 2 Am. Rep. 536; Den v. Hardenbergh, 10 N. J. Eq. 42, 47; 18 Am. Dec. 371; Thomas v. DeBaum, 14 N. J. Eq. 37, 40; McDermott v. French, 15 N. J. Eq. 78, 80; Wright v. Saddler, 29 N. Y. 320, 323; Jackson v. Stevens, 16 Johns. 110, 115, 116; Jackson v. Carey, 16 Johns. 301, 305; McCurdy v. Canning, 64 Pa. St. 39, 40.

2 Shaw v. Hearsay, 5 Mass. 521, 523; *ante*, §§ 39, 303.

3 Den v. Hardenbergh, 10 N. J. L. 42, 45, 48; 18 Am. Dec. 371; *ante*, § 304.

4 Hemingway v. Scales, 42 Miss. 1, 17; 2 Am. Rep. 536; *ante*, § 13.

5 Walthall v. Goree, 36 Ala. 723; Hoffman v. Stigers, 28 Iowa, 302, 307; Clark, 56 N. H. 105, 110. Consult *post*, § 308.

§ 308. **Effect of married women's separate property acts on estates by entireties.**—It is a general rule that married women's separate property acts do not affect the relation and unity of husband and wife except so far as they expressly refer thereto or as is necessary to render them efficient;<sup>1</sup> and since estates by entireties are not injurious to married women, or within the scope of these acts,<sup>2</sup> it is in accordance with this rule and the better view, that it is held in the United States court for the district of Oregon, etc., in Arkansas, Indiana, Maryland, Michigan, Mississippi, Missouri, New York, Pennsylvania, Wisconsin, and elsewhere, that these separate property acts do not destroy estates by entireties.<sup>3</sup> But in England, Alabama, Illinois, Iowa, and New Hampshire, it is on the other hand held that estates by entireties depend on the unity of husband and wife, and that the separate property acts have destroyed this unity as far as property is concerned, and that with the existence of this unity estates by entireties have ceased to exist,<sup>4</sup> and husband and wife hold property vesting in them both as tenants in common or as joint tenants,<sup>5</sup> with the same rights in their respective inter-



ests of each other as they would have if such other were co-tenant with a stranger.<sup>6</sup> These statutes are prospectively construed,<sup>7</sup> and affect only such property as is situate in the State where they have been passed.<sup>8</sup> Where it is settled that separate property acts do not destroy estates by entireties with their essential incidents of inseverableness and survivorship, how far they affect the husband's rights over such estates during coverture is a different question.<sup>9</sup> For the husband's right to the rents and profits during coverture, and to assign them for the period of his life, and the liability of the rents and profits of his debts, are not essential incidents of the estate by entireties,<sup>10</sup> but are incidents of the husband's estate in his wife's property *jure uxoris* during coverture;<sup>11</sup> and as this latter estate is no doubt destroyed by separate property acts,<sup>12</sup> and the wife is secured in her property acquired by grant, etc.,<sup>13</sup> it would seem that the husband's control of the estate by entireties is destroyed;<sup>14</sup> that the husband and wife have each the right to all the rents and profits;<sup>15</sup> that only by agreement can there be an apportionment;<sup>16</sup> and that the rents and profits can be assigned during coverture only by their joint act,<sup>17</sup> and are liable during coverture only for the joint debts of husband and wife,<sup>18</sup> and after the dissolution of the marriage only for the debts of the survivor.<sup>19</sup> But these questions are surrounded with difficulty and have not often been the subject of judicial determination.

1 Bertles v. Noonan, 92 N. Y. 152, 157, 165; 44 Am. Rep. 361; *ante*, § 14.

2 Diver, 56 Pa. St. 106, 109.

3 Myers v. Reed, 17 Fed. Rep. 401, 402, 403; Robinson v. Eagle, 27 Ark. 202, 207; Carver v. Smith, 90 Ind. 222, 225; Hulett v. Inlow, 57 Ind. 412, 414; 26 Am. Rep. 64, 65; Chandler v. Cheeney, 37 Ind. 391, 414; Marbourg v. Cole, 49 Md. 402, 413; 33 Am. Rep. 266; Fladung v. Rose, 58 Md. 13, 24; Fisher v. Perrin, 25 Mich. 347, 351; Duff v. Beauchamp, 50 Miss. 531, 535; Hall v. Stephens, 65 Mo. 670, 681; 27 Am. Rep. 102; Bertles v. Noonan, 92 N. Y. 152, 158; 44 Am. Rep. 361; Matteson v. N. Y. Central, 62 Barb. 373; Farmers v. Gregory, 49 Barb. 155, 162;



Goelet v. Gori, 31 Barb. 314, 319; Beach v. Hollister, 3 Hun, 519; Feeley v. Buckle, 28 Hun, 451; Wood v. Conin, 54 How. Pr. 95, 96; McCurdy v. Canning, 64 Pa. St. 39, 41; Diver, 56 Pa. St. 106, 109; French v. Mahan, 56 Pa. St. 289; Bates v. Seeley, 46 Pa. St. 248, 249; Bennett v. Child, 19 Wis. 362, 365, 366; 1 Bish. M. W. 438. See 18 Cent. L. J. 326.

4 Mander v. Harris, Law R. 24 Ch. Div. 222, 227, 230; 52 L. J. Ch. 630; Walthall v. Goree, 36 Ala. 728; Cooper, 76 Ill. 57, 64; Hoffman v. Stigers, 28 Iowa, 302, 307; Clark, 56 N. H. 105, 110. See 18 Cent. L. J. 326.

5 Hoffman v. Stigers, 28 Iowa, 302, 307; *supra*, n. 4.

6 Cooper, 76 Ill. 57, 64; *supra*, n. 4; *post*, § 310.

7 Myers v. Reed, 17 Fed. Rep. 401, 403; Elliott v. Nichols, 4 Bush, 502, 503; *ante*, § 20.

8 Myers v. Reed, 17 Fed. Rep. 401, 404; *ante*, §§ 33, 248.

9 Bertles v. Noonan, 92 N. Y. 152, 159, 164; 41 Am. Rep. 361.

10 See *ante*, § 306.

11 Discussed *ante*, §§ 146-150.

12 Discussed *ante*, § 150.

13 Discussed *ante*, §§ 217-243.

14 McCurdy v. Canning, 64 Pa. St. 39, 40. But see Hall v. Stephens, 65 Mo. 670, 673-681; 27 Am. Rep. 302.

15 See Carver v. Smith, 90 Ind. 222, 227.

16 See Atcheson, 11 Beav. 485, 491; Washburn v. Burns, 34 N. J. L. 18, 19; *ante*, § 306.

17 See Bertles v. Noonan, 92 N. Y. 152, 156, 159, 164; 44 Am. Rep. 361.

18 But see Goelet v. Gori, 31 Barb. 314, 319.

19 See Pringle v. Allen, 1 Hill Ch. 135.

§ 309. Effect of divorce on estates by entiroties.—A divorce *a vinculo matrimonii* renders husband and wife tenants in common in their estates by entireties,<sup>1</sup> except, it seems, as against a purchaser before the divorce;<sup>2</sup> but if the property be conveyed to them expressly as joint tenants, even though they should be deemed to hold it during coverture as tenants by entireties, in case of divorce they hold it as joint tenants still.<sup>3</sup>

1 Discussed Stewart M. & D. § 441.

2 Ames v. Norman, 4 Sneed, 683, 672.

3 Lash, 58 Ind. 526, 528.

§ 310. Joint and common estates of husband and wife.—If joint tenants or tenants in common marry, they con-

tinue joint tenants or tenants in common.<sup>1</sup> If a husband or wife is a joint tenant or a tenant in common with a third party, and that third party conveys his interest in the common or joint estate to the husband or wife of his co-tenant, the husband and wife become tenants in common.<sup>2</sup> And in the case of devises and conveyances to husband and wife together, though it has been said that they can take only as tenants by the entirety,<sup>3</sup> the prevailing rule is, that if the instrument expressly so provides, they may take as joint tenants or as tenants in common;<sup>4</sup> the married women's separate property acts, even when they do not destroy tenancies by entireties,<sup>5</sup> give the wife the capacity to take as a separate person.<sup>6</sup> So under statutes, husband and wife may be tenants in common or joint tenants.<sup>7</sup> In all cases where husband and wife are joint tenants or tenants in common, each has in the interest or estate of the other the same marriage rights as he or she would have if such other were co-tenant with some third party.<sup>8</sup>

1 McDermott v. French, 15 N. J. Eq. 78, 80.

2 Moore, 47 N. Y. 467; 7 Am. Rep. 466.

3 Brun v. Gover, 1 Hoff. Ch. 71, 76. See Pollock v. Kelly, 6 Ir. C. L. 367; Green v. King, 2 Black. W. 121; Barber v. Harris, 15 Wend. 617; Jackson v. Stevens, 16 Johns. 115; Rogers v. Benson, 5 Johns. Ch. 479; Stuckey v. Keefe, 26 Pa. St. 397.

4 Fladung v. Rose, 51 Md. 13, 22-25. See 4 Kent Com. 363; Preston on Estates, 131, 132; Chandler v. Cheney, 37 Ind. 391; Hoffman v. Stigers, 23 Iowa, 302, 310; Marbourg v. Cole, 49 Md. 402, 412; 33 Am. Rep. 263; McDermott v. French, 15 N. J. Eq. 73, 81; Hicks v. Cochran, 4 Edw. Ch. 107.

5 Discussed *ante*, ‡ 303.

6 Fladung v. Rose, 53 Md. 13, 24.

7 Hoffman v. Stigers, 23 Iowa, 302, 307.

8 Den v. Hardenbergh, 10 N. J. L. 42; 18 Am. Dec. 371.

‡ 311. Rights of husband and wife in personalty belonging to them both. — Personal property could never have been said to have been held by entireties,<sup>1</sup> for at common law any personalty of the wife belonged to her

husband if he reduced it to his possession during coverture,<sup>2</sup> and there is no reason why this should not apply to property in which he is partly interested. And yet a bequest to husband and wife and a third party equally, gave husband and wife only one share, a moiety;<sup>3</sup> and any chose in action standing in their joint names went absolutely to the survivor.<sup>4</sup> Even now, as at common law, unless some special circumstances manifesting a different intent are shown to defeat the right,<sup>5</sup> the surviving husband or wife takes the whole of a joint promissory note,<sup>6</sup> no matter who paid the consideration therefor<sup>7</sup> (unless, of course, creditors are affected);<sup>8</sup> so of a bond;<sup>9</sup> or a fund standing in their joint names;<sup>10</sup> or a joint deposit;<sup>11</sup> unless the presumption of an intended gift or equal interest is rebutted;<sup>12</sup> or joint mortgage;<sup>13</sup> or stock standing in their joint names;<sup>14</sup> or joint judgment,<sup>15</sup> recognizance,<sup>16</sup> decree,<sup>17</sup> or joint interest in the property of their deceased child.<sup>18</sup> But under married women separate property acts, the husband has no longer the right during coverture to use up or reduce to his own possession and ownership the personalty of his wife;<sup>19</sup> though it has been said that separate property acts do not apply to property held by both;<sup>20</sup> so, he can not alone release an obligation to them both.<sup>21</sup> If they jointly make an investment, they are tenants in common thereof,<sup>22</sup> either equally,<sup>23</sup> or to the extent to which they have each contributed,<sup>24</sup> and there is no survivorship;<sup>25</sup> but if by their joint efforts they increase the separate property of the wife, such increase belongs to her alone.<sup>26</sup> When an income is settled on them jointly, she has during coverture the right to a share thereof,<sup>27</sup> and if need be, as in the case of a separation, a court of equity will apportion it.<sup>28</sup> At common law, the interest during coverture in a joint fund, etc., was not affected even by

divorce.<sup>29</sup> An assignment by the husband of the whole joint chose in action during coverture passes a good title if he survives his wife.<sup>30</sup> The usual question in the case of joint investments, etc., is one of the intention of the parties.<sup>31</sup> Husband and wife are liable jointly for the obligations of their property.<sup>32</sup>

1 Abshire v. State, 53 Ind. 64, 66; Wait v. Bovee, 35 Mich. 425, 428; Polk v. Allen, 19 Mo. 467, 468.

2 Polk v. Allen, 19 Mo. 467, 468; *ante*, §§ 163-183.

3. Atcheson, 11 Beav. 485, 488; Bricker v. Whalley, 1 Vern. 233; Atty.-Gen. v. Backus, 9 Price, 30; 11 Price, 547; Atty.-Gen. v. Burney, 3 Younge & J. 531; *ante*, § 303.

4 Abshire v. State, 53 Ind. 64, 63; Pender v. Dicken, 27 Miss. 252; Sandford, 45 N. Y. 723, 726; Hill v. Saunders, 7 Serg. & R. 17; Richardson v. Daggett, 4 Vt. 336, 344; *ante*, §§ 123, 129, 231; *infra*, notes 6-18.

5 See Shields v. Stillman, 48 Mo. 82, 86; Marshall v. Crutwell, Law R. 20 Eq. 328, 339. See *infra*, notes 22-26.

6 Abshire v. State, 53 Ind. 64, 63; Draper v. Jackson, 16 Mass. 480, 486; Work v. Glaskins, 33 Miss. 539, 543; Shields v. Stillman, 48 Mo. 82, 86; Sandford, 45 N. Y. 723, 726; Scott v. Simes, 10 Bosw. 314; Johnson v. Lusk, 6 Cold. 113, 119; McMillan v. Mason, 5 Cold. 263; Richardson v. Daggett, 4 Vt. 336, 344; Richardson v. Slade, 30 Vt. 191.

7 Abshire v. State, 53 Ind. 64, 63; Sandford, 45 N. Y. 723, 726; *supra*, n. 6. Presumably paid by him: Work v. Glaskins, 33 Miss. 539, 543; *ante*, § 119.

8 Johnson v. Lusk, 6 Cold. 113, 119; *ante*, §§ 113-118.

9 Coppin, 2 P. Wms. 497; Dunstan v. Burwell, 1 Wills. 224; Laprimandage v. Teissier, 12 Beav. 206; Pike v. Collins, 33 Me. 38, 43; Briggs v. Beach, 18 Vt. 115, 118.

10 Batstone v. Salter, Law R. 10 Ch. 431, 433.

11 Orphan v. Strain, 2 Bradf. 34; *ante*, § 128.

12 Marshall v. Crutwell, Law R. 20 Eq. 328, 330.

13 Deare v. Carr, 3 N. J. Eq. 313, 317.

14 Dummer v. Pitcher, 5 Sim. 35, 43; Craig, 3 Barb. Ch. 76.

15 Oglander v. Baston, 1 Vern. 336; Deare v. Carr, 3 N. J. Eq. 513, 516; Schoonmaker v. Elmendorf, 10 Johns. 49.

16 Lodge v. Hamilton, 2 Serg. & R. 491.

17 Adams v. Lavender, McClel. & Y. 41, 57.

18 Frankenfeld v. Gruver, 7 Pa. St. 448.

19 Discussed *ante*, §§ 165, 170, 176.

20 Goelet v. Gori, 31 Barb. 314, 319; *ante*, §§ 231, 308.

21 Trimble v. Reis, 37 Pa. St. 448; McKinney v. Hamilton, 51 Pa. St. 63, 65.

22 Chambovet v. Cogney, 35 N. Y. Super. 474, 486; Wait v. Bovee, 35 Mich. 425, 429.

23 Wait v. Bovee, 35 Mich. 425, 428.

24 McTighe v. Bringhoff, 42 Iowa, 455, 458.

- 25 Wait v. Bovee, 35 Mich. 425, 429.
- 26 Norton v. Craig, 63 Me. 275, 276; *ante*, §§ 87, 203, 227.
- 27 Lee v. Zabriskie, 28 N. J. Eq. 422, 428, 429.
- 28 See Atcheson, 11 Beav. 485, 488, 491; Lee v. Zabriskie, 28 N. J. Eq. 422, 428, 429.
- 29 Bullock v. Zilley, 1 N. J. Eq. 439, 493; Vreeland v. Kyno, 26 N. J. Eq. 160; 27 N. J. Eq. 522; Beach v. Hollister, 5 Thomp. & C. 538; 3 Hub. 519; Ames v. Norman, 4 Sneed, 683; McCollum, 1 Heisk. 565; Stewart M. & D. 441.
- 30 Slavmaker v. Gettysburg, 10 Pa. St. 373, 376. See Krumbaar v. Burt, 2 Wash. C. C. 406; Outcalt v. Van Winkle, 2 N. J. Eq. 513.
- 31 Consult TRANSACTIONS BETWEEN HUSBAND AND WIFE, *ante*. §§ 99-134.
- 32 Keiman v. Hamilton, 141 Mass. 245, 247.

## CHAPTER XVII.

### COMMUNITY PROPERTY.

- § 312. Characteristics, origin, and history of community system.
- § 313. Statutes relating to community property.
- § 314. What is and is not community property.
- § 315. Rights of husband during coverture over.
- § 316. Rights of wife during coverture over.
- § 317. Rights of creditors of husband and wife over.
- § 318. Disposition of, on divorce or death.
- § 319. Conflict of laws as to.

§ 312. Characteristics, origin, and history of community system. — The central idea of the community system is that marriage creates a partnership in property between husband and wife, and that all property resulting from the labor of both or either of them, and all property vesting in them or either of them, except by gift, devise, bequest, or descent, enures to the benefit of both of them;<sup>1</sup> and though community property has not all the incidents of partnership property, it has many of them, and is commonly spoken of as partnership property.<sup>2</sup> This system belongs to the civil law and not to the common law,<sup>3</sup> it prevailed in France,<sup>4</sup> Spain,<sup>5</sup> and Mexico,<sup>6</sup> and was brought into those States which were colonized from these countries;<sup>6</sup> it now exists under statutes in California,<sup>7</sup> Louisiana, Nevada, Texas,<sup>8</sup> and Idaho;<sup>9</sup> and it formerly existed in Missouri.<sup>10</sup>

1 See discussions, *post*, §§ 314-318.

2 Buchanan, 8 Cal. 507, 509; La. Civ. Code 1875, § 2399; Wilkinson, 20 Tex. 242, 244; Cartwright v. Hollis, 5 Tex. 163.

3 See Cartwright, 18 Tex. 628; 1 Burge Col. & For. Laws, 202, 263, *et seq.*, 277, *et seq.*; *ante*, § 7.

4 LeBreton v. Miles, 8 Paige, 261, 266-269.

5 Meyer v. Kinzer, 12 Cal. 247, 251; Childress v. Cutler, 16 Mo. 24, 41.

6 Buchanan, 8 Cal. 507, 510; Fuller v. Furguson, 26 Cal. 546.

7 Buchanan, 8 Cal. 507, 510; Childress v. Cutler, 16 Mo. 24, 41.

8 See statutes, *post*, § 313.

9 Ray, 1 Idaho, N. S. 566.

10 *Childress v. Cutler*, 16 Mo. 24, 41.

§ 313. Statutes relating to community property.—In *California* by statute a husband and wife may hold property as joint tenants, tenants in common, or as community property.<sup>1</sup> All property of the husband or wife, owned by him or her respectively before marriage, and that acquired after marriage by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is respectively his or her separate property; all other property acquired after marriage, by either husband or wife, or both, is community property.<sup>2</sup> The husband has the management and control of the community property, with the like absolute power of disposition (other than testamentary) as he has of his separate property.<sup>3</sup> When alimony is allowed the wife, resort must be had first to the community.<sup>4</sup> When the husband and wife are divorced, the community is distributed in different ways depending on the grounds for the divorce and the respective innocence and guilt of the parties.<sup>5</sup> The wife cannot dispose of the community or any part thereof, except such as has been awarded her as alimony, by will, but the husband succeeds to the whole of it without administration;<sup>6</sup> the husband can dispose of half of it by will, and the whole of it is subject to his debts, the balance goes to the wife.<sup>7</sup> The statutory provisions in Nevada<sup>8</sup> and Texas<sup>9</sup> are almost identical with those of California. But the provisions of the Louisiana Civil Code are somewhat different. This Code provides, that by marriage a community or partnership of acquets or gains is created,<sup>10</sup> to which belong all the profits of all the effects of which the husband has control, all products of joint labor, all estates acquired during cover-

ture, all the fruits and increase of separate property or labor,<sup>11</sup> but not such increase in value of separate property as is due to extrinsic causes;<sup>12</sup> and which is subject to all the debts of husband and wife during coverture;<sup>13</sup> provided that the wife may escape the liabilities of the partnership by renouncing the benefits thereof;<sup>14</sup> and after the death of one of the parties, the net community is divided between the survivor and the heirs of the deceased.<sup>15</sup> These statutes are to a great extent declaratory of previously existing law,<sup>16</sup> and are construed alike in these several States.<sup>17</sup> These statutes take effect only in the absence of agreement between the parties, as these may establish their property rights by contract.<sup>18</sup>

1 Hart's Cal. Civ. Code, 1331, § 161; Marlow v. Barlew, 53 Cal. 456, 459; Nev. C. L. 1873, § 153.

2 Hart's Cal. Civ. Code, 1881, §§ 162-164, 637. See Buchanan, 8 Cal. 507; Johnson, 11 Cal. 201; Meyer v. Kinzer, 12 Cal. 247; Smith, 12 Cal. 216; Tompkins, 12 Cal. 114; Pixley v. Huggins, 15 Cal. 127; Mott v. Smith, 16 Cal. 533; Burton v. Lles, 21 Cal. 87; Adams v. Knowlton, 22 Cal. 283; Riley v. Pehl, 23 Cal. 70; Donald v. Badger, 23 Cal. 393; Fuller v. Fergusson, 26 Cal. 546; Ramsdell v. Fuller, 28 Cal. 37; Peck v. Brummagin, 31 Cal. 449; Ewald v. Corbett, 32 Cal. 493; Hussey v. Castle, 41 Cal. 230; Althof v. Conheim, 38 Cal. 230; *post*, § 314.

3 Hart's Cal. Civ. Code, 1881, § 172; *post*, § 315.

4 Hart's Cal. Civ. Code, 1881, § 141.

5 Hart's Cal. Civ. Code, 1881, §§ 146-148; *post*, § 318.

6 Hart's Cal. Civ. Code, 1881, § 1401; *post*, § 318.

7 Hart's Cal. Civ. Code, 1881, § 1402. See Beard v. Knox, 5 Cal. 252.

8 Nevada, C. L. 1873, §§ 151, 153, 153, 160-162.

9 Texas, R. S. 1879, §§ 1653, 1654, 2857, 2851-2853, 2867.

10 La. Civ. Code, 1875, § 2330; *post*, § 314.

11 La. Civ. Code, 1875, §§ 2402, 2404; *post*, § 314.

12 La. Civ. Code, 1875, §§ 2407, 2408.

13 La. Civ. Code, 1875, § 2403; *post*, § 317.

14 La. Civ. Code, 1875, § 2410.

15 La. Civ. Code, 1875, § 2406; *post*, § 318.

16 See Buchanan, 8 Cal. 507, 510; *ante*, § 312.

17 Smith, 12 Cal. 216, 224; Meyer v. Kinzer, 12 Cal. 247, 252.

18 Marlow v. Barlew, 53 Cal. 456, 459; La. Civ. Code, 1878, § 2424; Nev. C. L. 1873, § 176; LeBreton v. Miles, 8 Paige, 261, 263.



§ 314. What is and what is not community property.—The fundamental idea of the community system is that marriage makes the man and woman partners,<sup>1</sup> and that all property acquired after marriage is therefore partnership property;<sup>2</sup> that the separate property owned by each at the time of marriage, and such other as is acquired after marriage by either in some mode in which the other has no part, as by gift, descent, distribution, bequest, or devise, is the contribution of each to the firm, for which the firm must account to each separately.<sup>3</sup> And though by the statutes property acquired before marriage and after marriage, in the modes above specified, is kept separate and is not subject to the control of the other partner,<sup>4</sup> the general rule is, that all the increase of separate property, whether interest of money,<sup>5</sup> crops and rents of lands,<sup>6</sup> or offspring of animals,<sup>7</sup> is community property.<sup>8</sup> Children of slaves have always been an exception to this rule,<sup>9</sup> and the California Code now expressly renders the increase of separate property also separate property.<sup>10</sup> Still, it is doubtful even in California whether the profits of an investment of separate property are not community property,<sup>11</sup> and it is settled that the profits of the husband's separate business are separate property there<sup>12</sup> as elsewhere;<sup>13</sup> and all the products of the labor of either the husband or the wife are everywhere community property;<sup>14</sup> for example, the accumulations of his salary.<sup>15</sup> A woman not married to the man cannot claim community property,<sup>16</sup> and there is no community in property really acquired before marriage, though the title has been perfected after marriage.<sup>17</sup> Property acquired by the compromise of an antenuptial claim is community property;<sup>18</sup> so is property acquired by colonists;<sup>19</sup> headright certificates;<sup>20</sup> title acquired by settlers,<sup>21</sup> though the deed

was obtained by the husband after the wife's death;<sup>22</sup> so are improvements on separate lands,<sup>23</sup> though for these the community must be a debtor only, as they cannot be seized and sold separately;<sup>24</sup> so property acquired by the husband while the wife is in another State with his consent,<sup>25</sup> or after he has abandoned his wife,<sup>26</sup> or while he is living apart from her in adultery with another woman,<sup>27</sup> for it is not a question what part each actually took in the acquisition.<sup>28</sup> All property acquired by husband and wife or either of them during coverture is *prima facie* community property,<sup>29</sup> whether it stands in the name of both of them,<sup>30</sup> or of the husband<sup>31</sup> or the wife<sup>32</sup> alone; it seems that an acquisition in the names of both is conclusively community;<sup>33</sup> and all property held by them or either of them without written title is likewise presumed to be community property.<sup>34</sup> But, except in the case above mentioned, this presumption is rebuttable,<sup>35</sup> and the property may be shown to be separate property by clear and satisfactory proof<sup>36</sup> that the property was acquired in one of the modes named by statute for the acquisition of separate property,<sup>37</sup> or that it was exchanged for separate property,<sup>38</sup> or was given in payment of a separate debt,<sup>39</sup> or was purchased with separate funds.<sup>40</sup> If part of the consideration was separate property, the acquisition is separate property *pro tanto*,<sup>41</sup> or the community is indebted to the husband or wife, as the case may be, to the extent that his or her separate funds have been used.<sup>42</sup> It is not sufficient in order to show a separate purchase by a husband, to prove that at the time of the marriage he had considerable property and his wife had none.<sup>43</sup> The question is, however, one for the jury,<sup>44</sup> and the burden of proof is on the party alleging that the property is separate;<sup>45</sup> and even in the case of a deed, it may be proved by parol that the property, though in

the name of one of the spouses, is really separate property,<sup>46</sup> except as against a *bona fide* purchaser for value from the community.<sup>47</sup> The fact that a deed is to a wife alone, is not even *prima facie* evidence that the property is her separate property;<sup>48</sup> it must be shown that her funds paid for it,<sup>49</sup> or that it was a gift from her husband;<sup>50</sup> and to prove a gift from her husband, it is not sufficient to prove, as at common law,<sup>51</sup> that the deed was made to her alone at his request.<sup>52</sup> It is doubtful whether a deed between husband and wife dividing the community destroys the community.<sup>53</sup> The homestead is not community property.<sup>54</sup>

1 De Blane v. Lynch, 23 Tex. 25, 28. See Buchanan, 8 Cal. 537, 501; Wilkinson, 20 Tex. 242, 244; Cartwright v. Hollis, 5 Tex. 163; Jones, 15 Tex. 143, 147; Woodley v. Adams, 55 Tex. 526, 531; *ante*, § 312.

2 De Blane v. Lynch, 23 Tex. 25, 28, 29.

3 This idea is not logically carried out, but as to its existence, see Patton, Myr. Prob. 241, 246; Durham v. Williams, 32 La. An. 162; Denegre, 30 La. An. 275; Rice, 21 Tex. 58, 66.

4 See Lewis v. Johns, 24 Cal. 98, 102; *ante*, § 313.

5 See Cartwright, 18 Tex. 626, 633; *infra*, n. 8.

6 Harrall, 12 La. An. 549, 550; De Blane v. Lynch, 23 Tex. 25, 27; Forbes v. Dunham, 24 Tex. 611, 612; White v. Lynch, 26 Tex. 195, 196; *infra*, n. 8.

7 Bonner v. Gill, 5 La. An. 629, 630; Howard v. York, 20 Tex. 670, 672; *infra*, n. 8.

8 George v. Ransom, 15 Cal. 322, 323; Lewis, 18 Cal. 654, 659; Borie, 5 La. 89; Bonner v. Gill, 5 La. An. 629, 630; Prendergast v. Cassidy, 8 La. An. 96, 97; Glenn v. Elam, 3 La. An. 611, 615; Childers v. Johnson, 6 La. An. 634; Harrall, 12 La. An. 549, 550; Dodd v. Orillson, 14 La. An. 63, 69; De Blane v. Lynch, 23 Tex. 25, 27-29; Forbes v. Dunham, 24 Tex. 611, 612; White v. Lynch, 26 Tex. 195, 196; Christmas v. Smith, 10 Tex. 123, 126, 130; Yates v. Houston, 3 Tex. 433, 452; Cartwright, 13 Tex. 626, 628, 633; Howard v. York, 20 Tex. 670, 672; Scott v. Maynard, 11 La. 548, 550.

9 Goner, 11 Rob. (La.) 526, 527; Young, 5 La. An. 611, 612; Cartwright, 13 Tex. 626, 644.

10 George v. Ransom, 15 Cal. 322, 323; Lewis v. Johns, 24 Cal. 98, 102; *ante*, § 313.

11 Martin, 52 Cal. 235, 237.

12 Lewis, 18 Cal. 654, 659.

13 Prendergast v. Cassidy, 8 La. An. 96, 97; *infra*, n. 14.

14 Higgins v. Johnson, 20 Tex. 389, 394. S. P., Stans, Myr. Prob. 5, 6; Lewis, 18 Cal. 654, 659; Isaacson v. Mertz, 33 La. An. 595; Yates v. Houston, 3 Tex. 433, 455; De Blane v. Lynch, 23 Tex. 25, 28; Chapman v. Allen, 15 Tex. 278, 283.

- 15 Stans, Myr. Prob. 5, 6.
- 16 Winters, Myr. Prob. 131, 132.
- 17 Lake, 52 Cal. 428, 430.
- 18 Pancoast, 57 Cal. 320.
- 19 Yates v. Houston, 3 Tex. 433, 452.
- 20 Yates v. Houston, 3 Tex. 433, 454-456; Parker v. Chance, 11 Tex. 513, 517.
- 21 Cannon v. Murphy, 31 Tex. 405; Edwards v. James, 7 Tex. 372, 382. Not if husband migrates alone; McMasters v. Mills, 30 Tex. 591, 595.
- 22 Hodge v. Donald, 55 Tex. 344. But see Caudle v. Welden, 32 Tex. 355, 356.
- 23 Palton, Myr. Prob. 241, 246; Whiteman v. Blanc, 28 La. An. 430; Rice, 21 Tex. 58, 66.
- 24 Rice, 21 Tex. 58, 67; *supra*, n. 23.
- 25 Moore v. Thibodeaux, 4 La. An. 74, 76.
- 26 Winters, Myr. Prob. 131, 133.
- 27 Routh, 57 Tex. 533, 537.
- 28 De Blane v. Lynch, 23 Tex. 25, 29.
- 29 Althof v. Conheim, 38 Cal. 230, 233; Planchet, 29 La. An. 520, 522; Chapman v. Allen, 15 Tex. 278, 283. S. P., Martin, 52 Cal. 235, 237; Hussey v. Castle, 41 Cal. 239, 241; Peck v. Brummagin, 31 Cal. 440, 445; Ewald v. Corbett, 32 Cal. 493, 498; Buchanan, 8 Cal. 507, 509; Johnson, 11 Cal. 201, 205; Smith, 12 Cal. 216, 224; Meyer v. Kinzer, 12 Cal. 247, 252; Tompkins, 12 Cal. 114, 124; Pixley v. Huggins, 15 Cal. 127, 130; Burton v. Lies, 21 Cal. 87, 91; Adams v. Knowlton, 22 Cal. 283, 285; Riley v. Pehl, 23 Cal. 70, 74; Repplier v. Gow, 1 La. 478; Bostwick v. Gasquet, 11 La. 537; Ford, 1 La. 207; Forbes, 11 La. An. 326; Webb v. Peck, 7 La. An. 92; Troxler v. Colley, 33 La. An. 425; Smalley v. Lawrence, 9 Rob. 211; Tex. R. S. 1879, § 2853; Love v. Robertson, 7 Tex. 6, 11; 56 Am. Dec. 41; Lott v. Keach, 5 Tex. 304, 306; Houston v. Civil, 8 Tex. 240, 242; Galliard v. Chesney, 13 Tex. 337; Zorn v. Barber, 45 Tex. 519; Wheat v. Owens, 15 Tex. 243; Story v. Marshall, 24 Tex. 307; Smith v. Bognet, 27 Tex. 323; Routh, 57 Tex. 589, 597.
- 30 Ramsdell v. Fuller, 28 Cal. 37, 42; Tally v. Heffner, 29 La. An. 583, 584; Houston v. Civil, 8 Tex. 240, 242; *supra*, n. 29.
- 31 Buchanan, 8 Cal. 507, 509; Planchet, 29 La. An. 520, 522; Zimpelman v. Robb, 53 Tex. 274, 281; *supra*, n. 29.
- 32 Pixley v. Huggins, 15 Cal. 127, 130, 131; Donald v. Badger, 23 Cal. 333, 338; Riley v. Pehl, 23 Cal. 70, 74; Mott v. Smith, 16 Cal. 533, 557; Troxler v. Colley, 33 La. An. 425; Love v. Robertson, 7 Tex. 6, 10; Wells v. Cochran, 13 Tex. 127, 128; *supra*, n. 29.
- 33 Tally v. Heffner, 29 La. An. 583, 584. Unless, of course, the deed makes them joint tenants or tenants in common, *ante*, § 313; or a trust is proved, as at common law, *ante*, §§ 132, 311.
- 34 Lott v. Keach, 5 Tex. 304, 306. S. P., Meyer v. Kinzer, 12 Cal. 247, 252; Repplier v. Gow, 1 La. 478; Bostwick v. Gasquet, 11 La. 537; Le Gierse v. Moore, 59 Tex. 470, 471; Edrington v. Mayfield, 5 Tex. 363, 368; *supra*, n. 29.
- 35 Smith, 12 Cal. 216, 224; *infra*, n. 36.
- 36 Ramsdell v. Fuller, 28 Cal. 37, 42; Peck v. Brummagin, 31 Cal. 440, 447; Ford, 1 La. 207; Troxler v. Colley, 33 La. An. 425; Houston v. Civil, 8 Tex. 240, 242; Chapman v. Allen, 15 Tex. 278, 283; *supra*, n. 29.

37 *Meyer v. Kinzer*, 12 Cal. 247, 252; *Smith*, 12 Cal. 216, 224; *Houston v. Civil*, 8 Tex. 240, 242.

38 *Meyer v. Kinzer*, 12 Cal. 247, 253; *Parker v. Chance*, 11 Tex. 513, 517.

39 *Love v. Robertson*, 7 Tex. 6, 9.

40 *Mott v. Smith*, 16 Cal. 553, 557; *Ramsdell v. Fuller*, 23 Cal. 37, 42; *Lavenant v. Le Breton*, 1 La. 523, 524; *Troxler v. Colley*, 33 La. An. 425; *Love v. Robertson*, 7 Tex. 6, 11; *Claiborne v. Tanner*, 18 Tex. 69, 71; *supra*, n. 29.

41 *Claiborne v. Tanner*, 18 Tex. 69, 77. See *Ewald v. Corbett*, 32 Cal. 493, 498; *Webb*, Myr. Prob. 93; *Lawson v. Ripley*, 17 La. 238; *Denegre*, 30 La. An. 275; *Durham v. Williams*, 32 La. An. 162; *Braden v. Gose*, 57 Tex. 37; *Mitchell v. Marr*, 23 Tex. 320; *Parker v. Chance*, 11 Tex. 513, 518; *Wells v. Cochran*, 13 Tex. 127, 128; *Rice*, 21 Tex. 53, 66.

42 See *Durham v. Williams*, 32 La. An. 162; *Rice*, 21 Tex. 53, 67.

43 *Schmeltz v. Garey*, 49 Tex. 49.

44 *Rice*, 21 Tex. 58, 66.

45 *Donald v. Badger*, 23 Cal. 393, 398; *Meyer v. Kinzer*, 12 Cal. 247, 251; *Ramsdell v. Fuller*, 23 Cal. 37, 42; *Adams v. Knowlton*, 22 Cal. 283, 288; *Smith*, 12 Cal. 216, 224.

46 *Peck v. Brummagim*, 31 Cal. 440, 448; *Ramsdell v. Fuller*, 23 Cal. 37, 43; *Higgins v. Johnson*, 20 Tex. 389, 394.

47 *Tally v. Heffner*, 29 La. An. 583, 585; *Kirk v. Houston*, 49 Tex. 213; *Taylor v. Murphy*, 50 Tex. 291, 300; *Wallace v. Campbell*, 54 Tex. 87, 89.

48 *Wells v. Cochran*, 13 Tex. 127, 128. It is, of course, if the deed shows it to be acquired in one of the ways prescribed by statute for the acquisition of separate property: *Supra*, n. 4.

49 *Pixley v. Huggins*, 15 Cal. 127, 131; *Meyer v. Kinzer*, 12 Cal. 247, 253; *supra*, n. 40.

50 *Peck v. Brummagim*, 31 Cal. 440, 445; *Story v. Marshall*, 24 Tex. 307; *Braden v. Gose*, 57 Tex. 37; *Parker v. Chance*, 11 Tex. 513, 517; *Higgins v. Johnson*, 20 Tex. 389, 395; *post*, § 315.

51 *Parker v. Chance*, 11 Tex. 513, 519; *ante*, §§ 128, 129, 132.

52 *Parker v. Chance*, 11 Tex. 513, 518.

53 *Marlow v. Barlew*, 53 Cal. 456, 461.

54 *Tompkins*, 12 Cal. 114, 124.

§ 315. **Rights of husband during coverture, over community property.**—Though the husband and wife have equal interests in the community,<sup>1</sup> during the coverture her rights are passive,<sup>2</sup> and he has full management and control of the property,<sup>3</sup> and may deal with it almost as if it were his own.<sup>4</sup> He is its sole representative.<sup>5</sup> It is liable for his separate debts.<sup>6</sup> He has full power to dispose of it absolutely without her consent;<sup>7</sup> his sole deed passes community realty,<sup>8</sup> his sole

signature assigns community promissory notes,<sup>9</sup> though standing in her name;<sup>10</sup> in his sole name he sues in ejectment,<sup>11</sup> and enforces a promissory note.<sup>12</sup> He may give the property away,<sup>13</sup> but not with the intent to defraud her of her rights,<sup>14</sup> in view of divorce<sup>15</sup> or of death,<sup>16</sup> though her remedy in such case seems confined to a bill *quia timet*.<sup>17</sup> So he may give community property to his wife to be her separate property,<sup>18</sup> where no fraud on creditors exists.<sup>19</sup> And the property and his widow are bound by his estoppel.<sup>20</sup> But he cannot affect the interest of the wife by will,<sup>21</sup> or by any instrument to take effect after his death.<sup>22</sup> And after her death he cannot dispose of the community except to pay the debts thereof,<sup>23</sup> or to the extent of his own interest.<sup>24</sup> Divorce proceedings alone do not affect his rights,<sup>25</sup> though his abandonment of his wife may give her important powers.<sup>26</sup>

1 De Godey, 39 Cal. 157, 164; Wright v. Hays, 10 Tex. 130, 133; 60 Am. Dec. 200; Zimpelman v. Robb, 53 Tex. 274, 281.

2 Wright v. Hays, 10 Tex. 130, 133; 60 Am. Dec. 200; *post*, § 316.

3 Mott v. Smith, 16 Cal. 535, 557; Peck v. Brummagin, 31 Cal. 440; 447; Althof v. Conheim, 38 Cal. 230, 233; Cheek v. Bellows, 17 Tex. 613, 616; *ante*, § 313.

4 Lord v. Hough, 43 Cal. 581, 585; Pixley v. Huggins, 15 Cal. 127, 131; *supra*, n. 3.

5 Kelly v. Robertson, 10 La. An. 313.

6 Forbes v. Dunham, 21 Tex. 611, 612; *post*, § 317.

7 Pixley v. Huggins, 15 Cal. 127, 131; Althof v. Conheim, 38 Cal. 230, 233; Walters v. Jewett, 24 Tex. 192, 199, 201; Berry v. Wright, 14 Tex. 274; Brewer v. Wall, 23 Tex. 588; *supra*, n. 3.

8 Poe v. Brownrigg, 55 Tex. 133, 137. Not the homestead; Mabry v. Harrison, 44 Tex. 256.

9 Hemmingway v. Matthews, 10 Tex. 207, 208.

10 Pixley v. Huggins, 15 Cal. 127, 130, 131; *ante*, § 214.

11 Mott v. Smith, 16 Cal. 535, 557.

12 Wells v. Cochrum, 13 Tex. 127, 128.

13 Lord v. Hough, 43 Cal. 581, 585; *supra*, n. 7.

14 De Godey, 39 Cal. 157, 164; Smith, 12 Cal. 216, 225, 226; Peck v. Brummagin, 31 Cal. 440, 449; Lord v. Hough, 43 Cal. 581, 585; Colton, 31 La. An. 857, 859; Edwards v. James, 7 Tex. 38; Scott v. Maynard, Dall. 543, 550.

15 See Colton, 36 La. An. 853, 859; *supra*, n. 14; *post*, § 318.

- 13 See *De Godey*, 33 Cal. 157, 164; *supra* n. 14; *post*, § 318.
- 17 *Greiner*, 53 Cal. 115, 119, 120.
- 18 *Peck v. Brummagim*, 31 Cal. 440, 445; *ante*, § 414.
- 19 *Peck v. Brummagim*, 31 Cal. 440, 446; *ante*, §§ 113-118.
- 20 *Ranny v. Miller*, 51 Tex. 263, 269.
- 21 *Beard v. Knox*, 5 Cal. 252, 256; *Buchanan*, 8 Cal. 507, 510; *De Godey*, 33 Cal. 157, 164; *Greiner*, 53 Cal. 115, 119.
- 22 *Buchanan*, 8 Cal. 507, 510.
- 23 *Johnson v. Harrison*, 48 Tex. 457, 484, 531; *Veramead v. Hutchins*, 56 Tex. 414; *post*, § 318.
- 24 *Bennett v. Fuller*, 29 La. An. 663; *Billgery*, 34 La. An. 387, 388.
- 25 *Lord v. Hough*, 43 Cal. 581, 585. *Contra*, Tex. R. S. 1879, § 2867.
- 26 *Zimpelman v. Robb*, 53 Tex. 274 281; *post*, § 316.

§ 316. **Rights of the wife during coverture over the community.**—The wife's rights over the community are as well defined and ascertained as those of the husband;<sup>1</sup> though once called "a mere expectancy,"<sup>2</sup> her interest is equal to that of her husband;<sup>3</sup> he, however, has the full management thereof during coverture,<sup>4</sup> and she need not join with him in any contract<sup>5</sup> or suit<sup>6</sup> respecting the same. While his rights are active, hers are passive;<sup>7</sup> she cannot dispose of the community without his consent;<sup>8</sup> her mortgage thereof even as to her interest is void in California,<sup>9</sup> though if she survives her husband, it may be enforced against her.<sup>10</sup> With her husband's death her rights spring into activity, and she has all the powers of a *femme sole* over her interest;<sup>11</sup> so, under the various statutes, she may, for cause, have a separation of property, a partition of the community,<sup>12</sup> or may be awarded alimony out of it,<sup>13</sup> or may have a divorce with a division of the property.<sup>14</sup> So, if her husband abandons her (the length of time is not important)<sup>15</sup> and refuses to support her,<sup>16</sup> her rights over the community quicken into vigorous activity;<sup>17</sup> she may deal with it in his place;<sup>18</sup> she may sell it;<sup>19</sup> and she may even in her own name convey real estate standing in his name, so that subsequent *bona fide* purchasers for value from him will get nothing.<sup>20</sup>

- 1 De Godey, 39 Cal. 157, 164.
- 2 Van Maren v. Johnson, 15 Cal. 303, 311.
- 3 De Godey, 39 Cal. 157, 161; Wright v. Hays, 10 Tex. 130, 133; 60 Am. Dec. 200; Zimpleman v. Robb, 53 Tex. 274, 282.
- 4 Peck v. Brummagin, 31 Cal. 440, 447; *ante*, § 315.
- 5 Higgins v. Johnson, 20 Tex. 339, 335.
- 6 Pixley v. Higgins, 15 Cal. 127, 131.
- 7 Higgins v. Johnson, 20 Tex. 339, 336; *supra* n. 3.
- 8 Hemmingway v. Matthews, 10 Tex. 207.
- 9 Remington v. Higgins, 54 Cal. 629, 623; Cal. Civ. Code, 1331, § 167.
- 10 Parry v. Kelly, 52 Cal. 334, 335.
- 11 Womack v. Shelton, 31 Tex. 502, 503; *post*, § 318.
- 12 Jaffrion v. Bordelon, 14 La. An. 648, 619; Compton v. Maxwell, 33 La. An. 635; Belden v. Hanlon, 32 La. An. 85; La. Civ. Code, 1875, §§ 24, 29; Carite v. Trotol, 105 U. S. 751; Ray, 1 Idaho N. S. 566.
- 13 Cal. Civ. Code, 1881, § 141; Stewart M. & D. § 179.
- 14 Cal. Civ. Code, 1881, §§ 146-148; Nev. C. L. 1873, § 162; Stewart M. & D. §§ 358-399.
- 15 Fullerton v. Doyle, 18 Tex. 3, 13.
- 16 Consult Winters, Myr. Prob. 131, 133; Moore v. Thibodeaux, 14 La. An. 74, 76; Jaffrion v. Bordelon, 14 La. An. 618, 619; Routh, 57 Tex. 580, 597; Zimpleman v. Robb, 53 Tex. 274, 281; Walker v. Strongfellow, 30 Tex. 570, 573; Fullerton v. Doyle, 18 Tex. 3, 13; Cheek v. Bellows, 17 Tex. 613, 616; Wheat v. Owens, 15 Tex. 241, 245; *ante*, § 90.
- 17 Wright v. Hays, 10 Tex. 130, 134; 60 Am. Dec. 200.
- 18 Cheek v. Bellows, 17 Tex. 613, 616.
- 19 Walker v. Strongfellow, 30 Tex. 570, 573.
- 20 Zimpleman v. Robb, 53 Tex. 274, 281.

### § 317. Rights of creditors against community property.

—The community property is liable for the wife's antenuptial debts,<sup>1</sup> but not on any contract of hers made during coverture,<sup>2</sup> except for necessities,<sup>3</sup> which is really her husband's contract.<sup>4</sup> It is likewise liable for all antenuptial<sup>5</sup> and postnuptial debts of the husband;<sup>6</sup> as he can dispose of it absolutely, he can absolutely charge it with his debts.<sup>7</sup> But, as an entirety, it is not liable for any debt contracted after the dissolution of the marriage.<sup>8</sup> Being partnership property,<sup>9</sup> on the dissolution of the marriage it is a primary fund for the payment of all the community debts<sup>10</sup>—all the debts for which it is liable must be settled before the survivor or the heirs of the deceased have personally any interest;<sup>11</sup>



the whole fund, not a mere proportion thereof, is liable for the husband's debts,<sup>12</sup> and the husband may sell the community for the purpose of paying any debt for which it is liable.<sup>13</sup> In Louisiana, if the widow accept the community, she or her estate is liable for one half of the debts,<sup>14</sup> but if she renounce the same, neither she nor her estate can be held liable at all.<sup>15</sup> A judgment against both husband and wife can be enforced against the community property or against the separate property of either one;<sup>16</sup> but if a mortgage has been given for the husband's debts which covers both community property and separate property of the wife, she may have the community property exhausted first;<sup>17</sup> and judgment creditors cannot have a part of the community property set aside by metes and bounds to satisfy their debts.<sup>13</sup> In a foreclosure suit against the community, the wife should be made a party.<sup>19</sup>

1 *Vlautin v. Bumpus*, 35 Cal. 214, 215; *Van Maren v. Johnson*, 15 Cal. 303, 313; *Nash v. George*, 6 Tex. 234, 337; *Taylor v. Murphy*, 50 Tex. 291, 300.

2 *Remington v. Higgins*, 54 Cal. 620, 723; *ante*, § 316.

3 *Portis v. Parker*, 22 Tex. 699, 703; *Christmas v. Smith*, 10 Tex. 123, 129; *Edrington v. Mayfield*, 5 Tex. 363, 368.

4 Discussed *Stewart M. & D.* § 179; *ante*, §§ 64, 81.

5 *Porter v. Parker*, 22 Tex. 699, 703, 705; 14 Tex. 166, 170.

6 *McDonald v. Badger*, 23 Cal. 393, 398; *Adams v. Knowlton*, 22 Cal. 283, 288; *Tompkins*, 12 Cal. 114, 124; *Lott v. Keach*, 5 Tex. 394, 396; *Edrington v. Mayfield*, 5 Tex. 363, 368; *Forbes v. Dunham*, 24 Tex. 611, 612; *Jones*, 15 Tex. 143, 147.

7 *Tompkins*, 12 Cal. 114, 124; *ante*, § 315.

8 *Thezan*, 23 La. An. 442, 444.

2 *Woodley v. Adams*, 55 Tex. 526, 531; *ante*, § 314.

10 *Christmas v. Smith*, 10 Tex. 123, 129.

11 *Jones*, 15 Tex. 143, 147; *post*, § 318.

12 *Tompkins*, 12 Cal. 114, 124.

13 *Good v. Combs*, 28 Tex. 34, 51; *ante*, § 313.

14 *Ludeling v. Felton*, 29 La. An. 719.

15 *Reihl v. Martin*, 29 La. An. 15, 16; *ante*, § 313.

16 *Howard v. North*, 5 Tex. 290, 299; 51 Am. Dec. 763.

17 *James v. Jaques*, 23 Tex. 320, 324.

18 *Good v. Combs*, 28 Tex. 34, 51.

19 *Burton v. Lies*, 21 Cal. 87, 91.

§ 318. **Disposition of the community property on divorce or death.**—How the property shall be disposed of, on dissolution of the marriage by divorce or death, is fully provided for by the Codes.<sup>1</sup> The survivor can generally settle up the community with or without statutory authority,<sup>2</sup> and with or without going into court.<sup>3</sup> The survivor's own interest is residuary only;<sup>4</sup> the community property is a primary fund for the settlement of the community debts;<sup>5</sup> and though the survivor or the heirs of the deceased can assign their respective interests,<sup>6</sup> this cannot be done by metes and bounds,<sup>7</sup> as dissolution of the marriage turns the community into a tenancy in common.<sup>8</sup> Either party may by will dispose of such part of the community as would go to his or her representatives,<sup>9</sup> but neither can by will affect the interest of the other.<sup>10</sup> On divorce the property is divided;<sup>11</sup> a mere cause for divorce does not forfeit the rights of either party;<sup>12</sup> and after divorce the husband has no powers over the wife's interest.<sup>13</sup>

1 *Ante*, § 313. See *Delany*, Myr. Prob. 9; *Broad v. Murray*, 44 Cal. 223, 226; *Broad*, 40 Cal. 493, 496; *Burton v. Lies*, 21 Cal. 87, 91; *Beard v. Knox*, 5 Cal. 252, 256; *Tompkins*, 12 Cal. 114, 124; *Thoussard v. Bernard*, 7 La. 216; *Planchet*, 29 La. An. 520, 525; *Dickson*, 33 La. An. 1370; *Forstall*, 23 La. An. 197; *Frosclair*, 34 La. An. 326; *Thompson v. Cragg*, 24 Tex. 604; *Brackett v. Devine*, 25 Tex. 196; *Good v. Combs*, 28 Tex. 34, 50, 51; *Pucket v. Johnson*, 40 Tex. 550; *Burleson*, 28 Tex. 418; *Maxwell v. Morgan*, 20 Tex. 204; *Brown v. Prigden*, 56 Tex. 124; *Carnth v. Grigsby*, 57 Tex. 259, 265; *Bell v. Swartz*, 56 Tex. 353; *Watkins v. Hall*, 57 Tex. 1, 2; *Busby v. Davis*, 57 Tex. 323, 328; *Ore v. O'Brien*, 55 Tex. 149, 160; *Mitchell v. Dewitt*, 20 Tex. 299; *Tucker v. Brackett*, 28 Tex. 336, 333; *Wheeler v. Selvidge*, 30 Tex. 407; *Wall v. Clerk*, 10 Tex. 325; *Williamson*, 20 Tex. 244; *Monroe v. Leigh*, 15 Tex. 519, 520; *Duncan v. Rowle*, 16 Tex. 501; *Pruinin v. Barton*, 18 Tex. 222, 227.

2 See *Woodley v. Adams*, 55 Tex. 526, 531; *Stewart M. & D.* §§ 441, 467.

3 *Monroe v. Leigh*, 15 Tex. 519, 520; *Ore v. O'Brien*, 55 Tex. 149, 160. But see *Busby v. Davis*, 57 Tex. 323, 328.

4 *Dickson*, 33 La. An. 1370; *Durham v. Williams*, 32 La. An. 162; *Burleson*, 28 Tex. 418; *Bell v. Swartz*, 56 Tex. 353; *ante*, § 317.

- 5 Christmas v. Smith, 10 Tex. 123, 129.
- 6 Caruth v. Grigsby, 57 Tex. 259, 265; Good v. Combs, 23 Tex. 34, 42.
- 7 Good v. Combs, 23 Tex. 34, 51.
- 8 See Broad v. Murray, 44 Cal. 228, 229.
- 9 Brown v. Prigden, 56 Tex. 124; Cal. Civ. Code, § 1401.
- 10 Greiner, 53 Cal. 115, 119; Beard v. Knox, 5 Cal. 252, 256; Buchanan, 8 Cal. 507, 510; De Godey, 39 Cal. 157, 164; Brown v. Prigden, 56 Tex. 124.
- 11 De Godey, 39 Cal. 157, 164; Rice, 21 Tex. 58, 63; ante, § 313; Stewart M. & D. § 396.
- 12 Routh, 57 Tex. 589, 597.
- 13 De Godey, 39 Cal. 157, 164. Good v. Combs 160 Cal. 679, 82

§ 319. **Conflict of laws as to community property.** — The conflict of laws, generally, has already been discussed.<sup>1</sup> The community system of California applies to all personal property, wherever situate, of those who are domiciled in California;<sup>2</sup> but only to such lands as are situate in California,<sup>3</sup> not, for example, to lands in New Jersey;<sup>4</sup> it applies also to all personalty acquired by persons after forming the intention of moving with it into California.<sup>5</sup> A statute cannot be so applied as to make the earnings of existing separate property common property,<sup>6</sup> or as to turn community property into some other kind of property.<sup>7</sup>

- 1 *Ante*, §§ 19-37.
- 2 *Pratt v. Douglass*, 35 N. J. Eq. 516, 533; *ante*, § 31.
- 3 *Hoyt v. Hammerlin*, 14 How. 357; *ante*, § 33.
- 4 *Pratt v. Douglass*, 35 N. J. Eq. 516, 533.
- 5 *Edrington v. Mayfield*, 5 Tex. 363, 368; *Claiborne v. Tanner*, 18 Tex. 69, 77; *ante*, § 29.
- 6 *George v. Ransom*, 15 Cal. 322, 323; *ante*, §§ 21, 22.
- 7 *Portis v. Parker*, 22 Tex. 707; *ante*, §§ 21, 22.

# CHAPTER XVIII.

## HOMESTEAD PROPERTY.

- § 320. Purpose and policy of homestead and exemption laws.
- § 321. Construction of homestead laws.
- § 322. The party entitled to a homestead.
- § 323. The homestead defined.
- § 324. In what estates the homestead may exist.
- § 325. How the homestead is obtained.
- § 326. How the homestead may be lost.
- § 327. Nature of the homestead estate, and incidents.
- § 328. Rights of husband in and over the homestead.
- § 329. Rights of wife in and over the homestead.
- § 330. Liabilities of the homestead to claims of creditors.

§ 320. **Purpose and policy of homestead and exemption laws.**—In many States statutes have been passed for the purpose of securing to each head of a family a dwelling place for the family—a home exempt from the claims of creditors; these statutes are called homestead and exemption laws.<sup>1</sup> The policy of these laws has been frequently discussed and commended.<sup>2</sup> They are based, it is said, on the idea that, as a matter of public policy, for the promotion of the property of the State, and to render independent and above want each citizen of the government, it is proper that he should have a home—a homestead—where his family may be sheltered and live beyond the reach of financial misfortune and the demands of creditors.<sup>3</sup> They secure a beneficent provision for the protection and maintenance of the wife and children against the neglect and improvidence of the father and husband.<sup>4</sup> Their obvious intent is to secure to every house-holder or head of a family a home, a place of residence, which he may improve and make comfortable, and where the family may be sheltered and live beyond the reach of those

financial misfortunes which even the most prudent and sagacious cannot always avoid.<sup>5</sup> In these estates husband and wife, as the source of the family, are particularly concerned.

1 Smyth Homestead and Exemp. ; Thompson Homestead and Exemp. ; 19 Am. Law Reg. 1, 137 ; 1 Wash. Real Prop. 342, *et seq.*; 37 N. J. Eq. 39, 40, notes.

2 See Wassell v. Tunnah, 25 Ark. 103 ; Cook v. McChristian, 4 Cal. 26 ; Charless v. Lamberson, 1 Iowa, 439 ; Campbell v. Adair, 45 Miss. 182 ; Garrett v. Cheshire, 61 N. C. 405 ; 12 Am. Rep. 647 ; Franklin v. Coffee, 18 Tex. 415 ; Smyth Homest. ch. 1 ; Thompson Homest. ch. 1.

3 Charless v. Lamberson, 1 Iowa, 439, 441.

4 Cook v. McChristian, 4 Cal. 26.

5 Wassell v. Tunnah, 25 Ark. 103.

§ 321. Construction of homestead laws.—At common law a creditor could not seize his debtor's lands in execution, and could proceed only against his rents and profits, goods and chattels,<sup>1</sup> but the liability to be seized was gradually extended by statute until all lands were subjected to execution for debts ;<sup>2</sup> then followed a movement in the other direction, towards exempting a part of the lands, under certain circumstances, from this liability, the policy of which has already been discussed.<sup>3</sup> Therefore, although this has been ignored by some courts,<sup>4</sup> homestead laws are not in derogation of the common law, and therefore to be strictly construed,<sup>5</sup> but are remedial acts, beneficial in their operation and wise in their policy, which should be liberally construed ;<sup>6</sup> and the same rule of liberal interpretation is commonly applied to laws exempting chattels,<sup>7</sup> though such laws are in derogation of the common law, and therefore, under the rule, to be construed strictly, as they are in some cases.<sup>8</sup> In the absence of express provision, such statutes are construed to act prospectively, to apply only to debts existing at the time of their passage ;<sup>9</sup> and whether an express provision that they shall act retrospectively is consti-

tutional, is disputed; some courts, holding that such provisions affect only the remedy and not the contract itself, have declared them valid;<sup>10</sup> others deny this, and have declared that they impair the obligations of contracts and are therefore void;<sup>11</sup> of course they are void under constitutional provisions forbidding retrospective laws *eo nomine*.<sup>12</sup> When a statute is passed which does not apply to pre-existing debts, these are enforced under the laws existing at the time that they were contracted.<sup>13</sup> On the other hand, the legislature may remove or diminish the exemption,<sup>14</sup> which is a matter of grace, a privilege, and not a vested right,<sup>15</sup> though there are cases which seem to deny this.<sup>16</sup> A mere change in the form of the law, as by codification, has no effect.<sup>17</sup> These laws are construed to have no extra territorial operation,<sup>18</sup> and are generally administered by the United States courts.<sup>19</sup> Whether the exemption may be waived is disputed.<sup>20</sup>

1 2 Blackst. Com. 418; Vogler, 8 N. B. R. 132; Krueger v. Pierce, 37 Wis. 239; Thompson Homest. § 2.

2 See Green v. Marks, 25 Ill. 223; Thompson Homest. § 3.

3 *Ante*, § 320.

4 See Guillory v. Deville, 21 La. An. 686; Briant v. Lyons, 29 La. An. 65; Olson v. Nelson, 3 Minn. 53; Ward v. Huhn, 16 Minn. 161; Allen v. Cook, 26 Barb. 376; Garaty v. Du Bose, 5 S. C. 500.

5 According to rule stated, *ante*, § 16.

6 Moss v. Warner, 10 Cal. 296; Montague v. Richardson, 24 Conn. 338; Heard v. Downer, 47 Ga. 631; Roff v. Johnson, 40 Ga. 555; Deere v. Chapman, 25 Ill. 610, 612; Beran v. Hayden, 13 Iowa, 122; Campbell v. Adair, 45 Miss. 178; Buxton v. Dearborn, 46 N. H. 41; Peverly v. Sayles, 10 N. H. 353; Robinson v. Wiley, 15 N. Y. 494; True v. Morrill, 24 Vt. 671; Mills v. Grant, 36 Vt. 271; Howe v. Adams, 23 Vt. 541; Kuntz v. Kinney, 33 Wis. 510; Connaughton v. Sands, 32 Wis. 387.

7 Patten v. Smith, 4 Conn. 450; 10 Am. Dec. 166; Good v. Fogg, 61 Ill. 459; 14 Am. Rep. 71; Richardson v. Buswell, 10 Met. 506; 13 Am. Dec. 459; Wilcox v. Hawley, 31 N. Y. 648; Freeman v. Carpenter, 10 Vt. 434; 33 Am. Dec. 210; *supra*, n. 6.

8 Temple v. Scott, 3 Minn. 421; Rue v. Alter, 5 Denio, 119.

9 Whedon v. Gorham, 28 Conn. 412; Smith v. Marc, 26 Ill. 159; Ely v. Eastwood, 26 Ill. 107; Taylor, 10 La. An. 509; Roupe v. Carra-dine, 20 La. An. 244; Tillotson v. Millard, 7 Minn. 513; McKeethan v. Terry, 64 N. C. 25; Simonds v. Powers, 28 Vt. 354; Perrin v. Sargeant, 33 Vt. 81; Seamans v. Carter, 15 Wis. 548; Phelan, 16 Wis. 76; Dopp v. Abbee, 17 Wis. 590; *ante*, § 20.

10 See *Bronson v. Kinzie*, 1 How. 315; *Planter's v. Sharp*, 6 How. 318; *Sneider v. Heidelbarger*, 45 Ala. 126, 134; *Cook v. McChristian*, 4 Cal. 23; *Hardeman v. Downer*, 39 Ga. 425; *Pulliam v. Sewell*, 40 Ga. 73; *Gunn v. Barry*, 44 Ga. 353; *Cusic v. Douglas*, 3 Kan. 123; *Root v. McGrew*, 3 Kan. 215; *Robert v. Cow*, 25 La. An. 200; *Bigelow v. Pritchard*, 21 Pick. 174; *Rockwell v. Hubbell*, 2 Doug. (Mich.) 193; 65 Am. Dec. 246; *Grimes v. Byrn*, 2 Minn. 80; *Stephenson v. Osborn*, 41 Miss. 119; *Morse v. Gould*, 11 N. Y. 231; *Hill v. Kesler*, 63 N. C. 427; *Garrett v. Cheshire*, 69 N. C. 396; 12 Am. Rep. 647; *Hill*, 42 Pa. St. 193; *Baldy*, 40 Pa. St. 323; *Kennedy*, 2 S. C. 216; *Baylor v. San Antonio*, 23 Tex. 448; *ante*, §§ 21, 22.

11 *Gunn v. Barry*, 15 Wall. 610, reversing 44 Ga. 353; *Chambliss v. Jordan*, 50 Ga. 81; *Wheeler v. Redding*, 55 Ga. 87; *Bush v. Lester*, 55 Ga. 579; *Clarke v. Trowick*, 56 Ga. 359; *Hannahs v. Felt*, 15 Iowa, 111; *Deregre v. Hann*, 14 Iowa, 210; *Milne v. Schmidt*, 12 La. An. 533; *Lesley v. Phipps*, 49 Miss. 790; *Pennington v. Seal*, 49 Miss. 523; *Harvey v. Wickham*, 23 Mo. 116; *Ladd v. Dudley*, 45 N. H. 61; *Garrett v. Cheshire*, 69 N. C. 396; 12 Am. Rep. 647; *Edwards v. Kearsey*, 74 N. C. 241; *Cochran v. Darcy*, 5 S. C. 125; *Hewett*, 5 S. C. 409; *De la Howe v. Harper*, 5 S. C. 470; *The Homestead Cases*, 22 Gratt. 263; *Russell v. Randolph*, 26 Gratt. 705; *ante*, §§ 21, 22.

12 *Cunningham v. Grey*, 20 Mo. 172; *Talley v. Thompson*, 20 Mo. 277; *ante*, § 21.

13 See *Burnside v. Terry*, 45 Ga. 621; 51 Ga. 186; *Chambliss v. Jordan*, 50 Ga. 81; *Grant v. Cosby*, 51 Ga. 439; *Wofford v. Gaines*, 53 Ga. 435; *Clark v. Trawick*, 56 Ga. 359; *Lesley v. Phipps*, 49 Miss. 790; *Pennington v. Seal*, 49 Miss. 518.

14 *Sparger v. Cumpton*, 54 Ga. 355; *Harris v. Glenn*, 56 Ga. 94; *Allen v. Harley*, 3 S. C. 412; *Bull v. Conroe*, 13 Wis. 223; *Parker v. King*, 16 Wis. 223.

15 *Sparger v. Cumpton*, 54 Ga. 355, 359.

16 See *Finley v. Dietrick*, 12 Iowa, 516; *Coleman v. Ballandi*, 22 Minn. 147; *Martin v. Hughes*, 67 N. C. 236.

17 *Bridgman v. Wilcut*, 4 Greene, 563.

18 See *Boykin v. Edwards*, 21 Ala. 261; *Newell v. Hayden*, 8 Iowa, 149; *Helfenstine v. Cave*, 3 Iowa, 247; *Baltimore v. May*, 25 Ohio St. 347; *Morgan v. Neville*, 74 Pa. St. 52. *Contra*, *Pierce v. Chicago*, 36 Wis. 388.

19 Discussed *Thompson Homest.* §§ 24-25.

20 See *Thompson Homest.* §§ 440-450; *post*, § 327.

§ 322. The party entitled to homestead exemption.— Generally, to be entitled to the benefit of the homestead exemption law, a party must have a family, and a home which it occupies in the State.<sup>1</sup> A husband who has a wife, has a family;<sup>2</sup> and in some States the wife, although not the head of the family, may have a homestead set off;<sup>3</sup> but not if her husband is in another State and she has no children,<sup>4</sup> and not out of the husband's property without his consent, express or im-

plied.<sup>5</sup> The claimant must have a home in which the family reside,<sup>6</sup> and, though he may be temporarily absent without losing his rights,<sup>7</sup> a permanent removal destroys the homestead.<sup>8</sup> So he must have a family to reside in the home, and when, by death<sup>9</sup> or divorce,<sup>10</sup> or for other reasons, the family is permanently broken up, the homestead is gone;<sup>11</sup> but the mere abandonment of his family by a husband,<sup>12</sup> or the abandonment of the husband by the wife,<sup>13</sup> or even divorce, will not destroy the homestead right, as long as there remains a part of the family to occupy the home.<sup>14</sup> It is sufficient if the claimant be a resident,<sup>15</sup> he need not be a native,<sup>16</sup> or a permanent inhabitant.<sup>17</sup> A Methodist itinerant preacher was allowed to have a homestead.<sup>18</sup>

1 Thompson Homest. §§ 40-93; Smyth Homest.

2 Kitchell v. Burgwin, 21 Ill. 40, 45.

3 Ga. Code 1873, § 2022; Bowen, 53 Ga. 182; Partee v. Stewart, 50 Miss. 717, 720; Holthaus v. Hornbostle, 60 Mo. 431.

4 Keiffer v. Barney, 31 Ala. 136.

5 Bowen, 50 Ga. 132; Richards v. Greene, 73 Ill. 54.

6 Gunn v. Gudehaus, 15 Mon. B. 452; *post*, § 323.

7 Carrington v. Herrin, 4 Bush, 621; Woodward v. Murray, 13 Johns. 400; Griffin v. Sutherland, 14 Barb. 453; *post*, § 323.

8 Fyffe v. Beers, 13 Iowa, 7.

9 See Burns v. Jones, 37 Tex. 50; Petty v. Barrett, 37 Tex. 84.

10 See Cooper, 24 Ohio St. 439; Richey v. Hare, 41 Tex. 336.

11 See Redfern, 38 Ill. 509; Byers, 21 Iowa, 268; Woods v. Davis, 34 Iowa, 264; Doyle v. Coburn, 6 Allen, 73; Silloway v. Brown, 12 Allen, 31; Meader v. Place, 43 N. H. 307; Atkinson, 40 N. H. 249; 37 N. H. 456; Cooper, 24 Ohio St. 439; Reeves v. Petty, 44 Tex. 251.

12 Moore v. Deming, 29 Ill. 130; White v. Clark, 36 Ill. 235.

13 Doyle v. Coburn, 6 Allen, 71; Meader v. Place, 43 N. H. 308; Atkinson, 37 N. H. 249; 37 N. H. 436. In Texas, by abandonment she forfeits her right: Trawick v. Harris, 8 Tex. 312; Newland v. Holland, 45 Tex. 538.

14 See Vanzant, 23 Ill. 536, 542; Bonnell v. Smith, 53 Ill. 375, 383; Redfern, 38 Ill. 509; Byers, 21 Iowa, 268; Doyle v. Coburn, 6 Allen, 71; Newland v. Holland, 45 Tex. 538.

15 Alston v. Ulman, 39 Tex. 157.

16 McKeuzie v. Murphy, 24 Ark. 155.

17 Dawley v. Algiers, 23 Cal. 103.

18 Dearing v. Thomas, 25 Ga. 223.



§ 323. The homestead defined.—The homestead consists of the dwelling-house in which the claimant resides and the land on which it is situate,<sup>1</sup> selected according to law.<sup>2</sup> It is the home place, the place where the home is, be it a house, cabin, or tent;<sup>3</sup> the house and the adjoining land where the head of the family dwells, the home farm;<sup>4</sup> the place where a man surrounds himself with the insignia of home, and enjoys its immunities and privacies.<sup>5</sup> It necessarily includes the idea of residence.<sup>6</sup> Great difficulties are met in determining how far a dwelling used for other purposes, or a place of business used as a dwelling, is a homestead;<sup>7</sup> but it is essential that the premises be actually used, or manifestly intended to be used, as part of the home of the family.<sup>8</sup> In California it is said that the only tests are use and value,<sup>9</sup> for the extent of the homestead is generally limited by statute.<sup>10</sup> The principles as applied to homesteads in the city, or urban homesteads, and to homesteads in the country, or rural homesteads, bring somewhat different results,<sup>11</sup> a discussion of which is not within the scope of this volume.

1 See *Greeley v. Scott*, 2 Woods, 657; *Tumlinson v. Swinney*, 22 Ark. 400; *Norris v. Kidd*, 23 Ark. 485; *Cook v. McChristian*, 4 Cal. 23; *Taylor v. Hargous*, 4 Cal. 268; *Gregg v. Bostwick*, 33 Cal. 220, 225, 227; *Delaney*, 37 Cal. 180; *Tourville v. Pierson*, 39 Ill. 446; *Kitchell v. Burgwin*, 21 Ill. 40; *Brown v. Martin*, 4 Bush, 47; *Dyson v. Shelley*, 11 Mich. 527; *Tillotson v. Millard*, 7 Minn. 513; *Hoitt v. Webb*, 36 N. H. 158, 166; *Barney v. Leeds*, 51 N. H. 265; *Clark v. Shannon*, 1 Nev. 565; *Wetz v. Beard*, 12 Ohio St. 431; *Hancock v. Morgan*, 17 Tex. 581; *Ilgen v. Olenick*, 42 Tex. 198; *Mills v. Grant*, 36 Vt. 299; *Morgan v. Stearns*, 41 Vt. 393; *Phelps v. Rooney*, 9 Wis. 79; *Bunker v. Locke*, 15 Wis. 635, 638.

2 Discussed *post*, § 225.

3 *Franklin v. Coffee*, 18 Tex. 413.

4 *Hoitt v. Webb*, 36 N. H. 158, 166; *Bunker v. Locke*, 15 Wis. 635, 638.

5 *Philleo v. Smally*, 23 Tex. 498, 502.

6 *Stanley v. Greenwood*, 24 Tex. 224.

7 Compare *Hoitt v. Webb*, 36 N. H. 158, 166, with *Houston v. Winter*, 44 Tex. 611. See *Stevens v. Hollingsworth*, 74 Ill. 203; *Perkins v. Quigley*, 62 Mo. 503; *Buxton v. Dearborn*, 43 N. H. 47; *supra*, n. 1.

8 *Grasholtz v. Newman*, 21 Wall. 386; *Houston v. Winter*, 44 Tex. 611.

9 *Gregg v. Bostwick*, 33 Cal. 220, 226.

10 See *Donald v. Badger*, 23 Cal. 393; *Blue*, 33 Ill. 9; *Clark v. Shannon*, 1 Nev. 563; *Tken v. Olenick*, 42 Tex. 198, 199.

11 Discussed fully, *Thompson Homst.* §§ 125-161; *Smyth Homest.*

§ 324. In what estates homestead may exist. — A homestead may exist in property held by a wrongful title,<sup>1</sup> except as against the true owner,<sup>2</sup> in equitable estates,<sup>3</sup> so that the husband can no more defeat the wife's right by conveying equitable property without her joinder than he could by so conveying legal property,<sup>4</sup> in life estates,<sup>5</sup> but it ceases with life;<sup>6</sup> in leaseholds;<sup>7</sup> in common and joint estates in some States,<sup>8</sup> in others not;<sup>9</sup> not in partnership estates.<sup>10</sup> A homestead may be claimed out of the wife's separate property,<sup>11</sup> or out of property owned jointly by husband and wife.<sup>12</sup> "Whether the property on which the family live belongs to either or to all so living together, it equally comes within the purview of the constitutional guaranty, and is in fact a homestead, and cannot be subjected to forced sale."<sup>13</sup> But a single family cannot hold more than one homestead,<sup>14</sup> and therefore both husband and wife cannot each have a homestead.<sup>15</sup> The homestead laws were intended to embrace all property which could be seized in execution.<sup>16</sup>

1 *Spencer v. Geissman*, 37 Cal. 99; *Garaty v. Du Bose*, 5 S. C. 493.

2 *Mann v. Rogers*, 35 Cal. 316; *McClurken*, 46 Ill. 327.

3 *Bartholemew v. West*, 2 Dill. 293; *Allen v. Hawley*, 66 Ill. 164; *Stinson v. Richardson*, 44 Iowa, 373; *Moore v. Reaves*, 15 Kan. 150; *Orr v. Shraft*, 22 Mich. 260; *Wilder v. Haughey*, 21 Minn. 101, 107; *Cheatani v. Jones*, 63 N. C. 153; *Morgan v. Stearns*, 41 Vt. 398; *Doane*, 46 Vt. 435; *McCabe v. Mazzuchelli*, 13 Wis. 478. *Contra*, *Garaty v. Du Bose*, 5 S. C. 493; *McManus v. Campbell*, 37 Tex. 267.

4 *Allen v. Hawley*, 66 Ill. 164; *Moore v. Reaves*, 15 Kan. 153; *McKee v. Wilcox*, 11 Mich. 353; *Hartman v. Munch*, 21 Minn. 107; *McCabe v. Mazzuchelli*, 13 Wis. 478.

5 *Deere v. Chapman*, 25 Ill. 610; *Potts v. Davenport*, 79 Ill. 456.

6 *Brown v. Keller*, 32 Ill. 151.

7 *Conklin v. Foster*, 57 Ill. 104; *Pelan v. De Bevard*, 13 Iowa, 53; *Johnson v. Richardson*, 33 Miss. 462.

8 *Greenwood v. Maddox*, 27 Ark. 660; *Hewitt v. Rankin*, 41 Iowa, 35, 41; *Tarrant v. Swain*, 15 Kan. 146; *Horn v. Tufts*, 30 N. H. 478; *Williams v. Wethered*, 37 Tex. 130; *Smith v. Deschaumes*, 27 Tex. 429; *McClary v. Bixby*, 36 Vt. 254.

9 *Elias v. Verdugo*, 27 Cal. 418; *Seaton v. Son*, 32 Cal. 481; *Cameto v. Dupuy*, 47 Cal. 79; *Ventress v. Collins*, 23 La. An. 783; *Bemis v. Driscoll*, 101 Mass. 421; *Amphlett v. Hibbard*, 29 Mich. 298; *Ward v. Huhn*, 16 Minn. 159; *West v. Ward*, 26 Wis. 580.

10 *Handlin*, 3 Dill. 290; *Kingsley*, 39 Cal. 665; *Guptil v. McTee*, 9 Kan. 30, 35; *Pond v. Kimball*, 101 Mass. 105; *Amphlett v. Hibbard*, 29 Mich. 298; *State v. Spencer*, 64 Mo. 355; 27 Am. Rep. 244; *Rhodes v. Williams*, 12 Nev. 20, 23; *Gaylord v. Imhoff*, 26 Ohio St. 317; 20 Am. Rep. 762; *Bonsell v. Conely*, 44 Pa. St. 447; *Russell v. Lennon*, 39 Wis. 570.

11 *Tourville v. Pierson*, 39 Ill. 446, 453; *Orr v. Shraft*, 22 Mich. 260, 261. See *Murray v. Sells*, 53 Ga. 257; *Crane v. Waggoner*, 33 Ind. 83; *Partee v. Stewart*, 50 Miss. 717; *Dwinell v. Edwards*, 23 Ohio St. 603.

12 *Willis v. Matthews*, 46 Tex. 478, 484.

13 *Wilson v. Cochran*, 31 Tex. 630.

14 *Gambette v. Brock*, 41 Cal. 84; *Tourville v. Pierson*, 39 Ill. 447; *Franklin v. Coffee*, 18 Tex. 413.

15 *Dwinell v. Edwards*, 23 Ohio St. 603.

16 See *Deere v. Chapman*, 25 Ill. 610, 612. See *Bartholemew v. West*, 2 Dill. 233; *Conklin v. Foster*, 57 Ill. 107; *Randal v. Elder*, 12 Kan. 231; *Vogler v. Montgomery*, 54 Mo. 534; *Sears v. Hanks*, 14 Ohio St. 39L.

§ 325. **How a homestead is obtained.**—There are three ways in which one entitled to a homestead may obtain this estate:<sup>1</sup> (1) By public record notice under the provisions of statutes.<sup>2</sup> (2) By visible occupancy and use.<sup>3</sup> (3) By having the homestead set off in judicial proceedings.<sup>4</sup> The second is the most common mode of acquiring a homestead, and even when the other modes are pursued, it is necessary that the property so declared or claimed to be a homestead shall be actually occupied and used as the family home.<sup>5</sup>

1 Discussed *Thompson Homest.* §§ 230-260; *Smyth Homest.*

2 See *Statutes of Ala., Cal., Colo., Iowa, Me., Mass., Minn., Mo., N. Y., Va., and Vt.*; *Thompson Homest.* § 231; *Calderwood v. Tevis*, 23 Cal. 335; *Drake v. Root*, 2 Colo. 685.

3 *Tourville v. Pierson*, 39 Ill. 446; *Letchford v. Cary*, 52 Miss. 791; *Stone v. Darnell*, 20 Tex. 11.

4 *Holden v. Pinney*, 6 Cal. 234; *Thrasher v. Bettis*, 53 Ga. 407; *Silloway v. Brown*, 12 Allen, 34; *Chambers v. Penland*, 74 N. C. 340.

5 *Gregg v. Bostwick*, 33 Cal. 220; *Prescott*, 45 Cal. 53; *Christy v. Dyer*, 14 Iowa, 438; *Page v. Ewbanks*, 18 Iowa, 489; *Elston v. Robinson*, 23 Iowa, 208; *Lee v. Miller*, 11 Allen, 37; *Edwards v. Fry*, 9 Kan. 417, 425; *Spalding v. Crane*, 46 Vt. 208; *Thompson Homest.* §§ 240-260.

§ 326. How the homestead may be lost.—Just as the most common way of acquiring a homestead is by actual occupation of the premises,<sup>1</sup> so the most common way of losing the homestead is by ceasing to occupy the same—by abandonment.<sup>2</sup> A mere temporary removal,<sup>3</sup> or unexecuted intention to leave the premises,<sup>4</sup> is not an abandonment; there must be actual cessation of occupation with the intent of no longer treating the premises as the home.<sup>5</sup> The question is therefore largely one of intent,<sup>6</sup> and this is proved as a matter of fact,<sup>7</sup> by the declarations of the claimant,<sup>8</sup> by the length and character of his absence,<sup>9</sup> and conclusively, by the fact that he has acquired another homestead.<sup>10</sup> After abandonment, a homestead in the same property must be acquired as though the first homestead had never existed,<sup>11</sup> and the property, in spite of the acquisition of a second homestead therein, is liable for all debts incurred meanwhile.<sup>12</sup> The husband as head of his family may change his home as often as he pleases,<sup>13</sup> and therefore abandon the homestead without his wife's consent;<sup>14</sup> but his mere desertion from her is not an abandonment of the homestead, if she continues to live on the premises;<sup>15</sup> nor does her abandonment of the homestead affect the husband's rights,<sup>16</sup> or even her own,<sup>17</sup> therein; still, if she lives with him, and then separating from him returns, the homestead is gone.<sup>18</sup> So the homestead may be lost by a joint conveyance of the husband and wife,<sup>19</sup> and in some cases by legal proceedings to which the husband and wife are both parties.<sup>20</sup>

1 *Ante*, § 325.

2 Austin v. Stanley, 46 N. H. 51; Bell v. Schwarz, 37 Tex. 572. Discussed Thompson Homest. §§ 263-280.

3 Davis v. Kelly, 14 Iowa, 525; Orman, 26 Iowa, 361.

4 Dawley v. Ayres, 23 Cal. 108; Cross v. Everts, 23 Tex. 523.

5 Fyffe v. Beers, 18 Iowa, 7; McMillan v. Warner, 33 Tex. 410.

6 Cabeen v. Mulligan, 37 Ill. 230. See Taylor v. Hargous, 10 Cal. 226; Guio l, 14 Cal. 506; Harper v. Forbes, 15 Cal. 202; Ives v. Mills, 37 Ill. 73; Kitchell v. Burgwin, 21 Ill. 40; Delaney v. Pynchon, 6 Allen, 510; Lazell, 8 Allen, 575; Campbell v. Adair, 45 Miss. 171; Jordan v. Godman, 19 Tex. 273; Shepherd v. Cassiday, 20 Tex. 24; Herriek v. Graves, 16 Wis. 157.

7 Brennan v. Wallace, 25 Cal. 108; Fyffe v. Beers, 18 Iowa, 7; Shepherd v. Cassiday, 20 Tex. 24, 26.

8 Wright v. Dunning, 46 Ill. 271; Anderson v. Kent, 14 Kan. 207; McMillan v. Warner, 33 Tex. 410; Holliman v. Smith, 39 Tex. 357. Declarations of husband admissible against wife: Brennan v. Wallace, 25 Cal. 115.

9 *Supra*, n. 3.

10 Carr v. Rising, 62 Ill. 14; Fyffe v. Beers, 18 Iowa, 7; Drury v. Batchelder, 11 Gray, 214; Holliman v. Smith, 39 Tex. 362; Jarvais v. Moe, 38 Wis. 440.

11 Phillips v. City, 39 Ill. 83; Davis v. Kelly, 14 Iowa, 525; Carter v. Goodman, 11 Bush, 223; Campbell v. Adair, 45 Miss. 170.

12 Pitman v. Moore, 43 Ill. 163.

13 Discussed *ante*, § 60.

14 Guidé, 14 Cal. 506; Brown v. Coon, 36 Ill. 243; Pitman v. Moore, 43 Ill. 174; Burson v. Fowler, 65 Ill. 146; Hand v. Winn, 52 Miss. 788; Foss v. Strachn, 42 N. H. 40; Jordan v. Godman, 19 Tex. 273.

15 Gambette v. Brock, 41 Cal. 625; Benson v. Aitken, 17 Cal. 163; Dearing v. Thomas, 25 Ga. 223; Moore v. Dunning, 29 Ill. 135; White v. Clark, 36 Ill. 285.

16 Doyle v. Coburn, 6 Allen, 71.

17 Lies v. De Diablar, 12 Cal. 327; Meader v. Place, 43 N. H. 307; Welch v. Rice, 31 Tex. 633.

18 Allison v. Shilling, 27 Tex. 450, 454; Phillips v. City, 39 Ill. 83.

19 Lies v. De Diablar, 12 Cal. 327; *post*, § 327.

20 Marks v. Marsh, 9 Cal. 96; Van Reynegan v. Revolt, 8 Cal. 75; Cassell v. Ross, 33 Ill. 244; Chase v. Abbott, 25 Iowa, 154; Clark v. Shannon, 1 Nev. 563; *post*, § 323.

§ 327. Nature and incidents of homestead estate. — Property which is held by husband and wife as their homestead is subject to peculiar incidents. Being purely a statutory estate,<sup>1</sup> it can be created and destroyed only in modes prescribed by statute;<sup>2</sup> and the statutes also provide how it shall be held in case of the dissolution of the marriage.<sup>3</sup> Thus, in California, it was held that

the homestead was a kind of joint estate with the incident of survivorship,<sup>4</sup> and was therefore not assets of the husband's estate.<sup>5</sup> And when the estate is assigned its incident of exemption from debts no longer continue, this is a personal right which cannot be assigned.<sup>6</sup> In New Hampshire the wife's right in the homestead during coverture is analogous to dower, and merely inchoate.<sup>7</sup>

1 *Ante*, § 321.

2 See *Boyd v. Cudderback*, 31 Ill. 163; *Connor v. McMurray*, 2 Allen, 204; *Abbott v. Cromartie*, 72 N. C. 548; 21 Am. Rep. 457; *Beavan v. Speed*, 74 N. C. 548; *ante*, §§ 326, 327.

3 *Wixon*, 35 Cal. 320; *Cotton v. Wood*, 25 Iowa, 43.

4 *Buchanan*, 8 Cal. 507, 509; *Tompkins*, 12 Cal. 114, 125.

5 See also *O'Docherty v. McGloin*, 25 Tex. 67.

6 *Bowman v. Norton*, 16 Cal. 213; *Hewitt v. Templeton*, 48 Ill. 367; *Bennett v. Culler*, 44 N. H. 63; *Bowyer*, 21 Pa. St. 210.

7 *Gunnison v. Twitchell*, 38 N. H. 62; *Foss v. Stracher*, 42 N. H. 40.

§ 323. **Rights of husband in and over the homestead.**—The husband, by virtue of his right to determine the residence of his family, may locate and abandon a homestead without the wife's consent.<sup>1</sup> So, unless the statute provides otherwise, as they nearly all do, he can alienate the homestead without his wife's joinder.<sup>2</sup> But under the statutes the wife must join,<sup>3</sup> and her separate acknowledgement is in some States necessary;<sup>4</sup> and generally the deed must express the fact that the wife joins for the purpose of releasing the homestead.<sup>5</sup> When the wife's joinder is necessary, the deed without it is void not only as to her,<sup>6</sup> but as to her husband,<sup>7</sup> and the alienee can have no rights in the homestead unless the same is abandoned to him,<sup>8</sup> or the husband survives his wife.<sup>9</sup> But separate deeds by husband and wife do not sufficiently fill the requirement of joinder.<sup>10</sup> A conveyance by the husband to his wife and children is not within the operation of these statutes limiting his

powers of alienation.<sup>11</sup> On the wife's death the husband continues the head of the family, and as such, if he has any family, he can hold on to the homestead.<sup>12</sup> The homestead is not liable for the husband's debts,<sup>13</sup> this is the essential feature of this estate.<sup>14</sup> But as husband he has full power to manage the estate,<sup>15</sup> and if he owns the fee, he is owner of the homestead.<sup>16</sup> He cannot deprive his wife of it by will.<sup>17</sup>

1 Gulod, 14 Cal. 506; *Burson v. Fowler*, 65 Ill. 146; *Brown v. Coon*, 36 Ill. 243; *Titman v. Moore*, 43 Ill. 174; *Hand v. Winn*, 52 Miss. 788; *Foss v. Stracher*, 42 N. H. 40; *Jordan v. Godman*, 19 Tex. 273.

2 See *Cross*, 2 Dill. 320; *Dawson v. Hayden*, 67 Ill. 52; *Chamberlain v. Lyell*, 3 Mich. 448; *Rector v. Rotton*, 3 Neb. 171; *Homestead v. Enslow*, 7 S. C. 19; *Kennedy v. Stacey*, 57 Tenn. 223, 224; *Morrill v. Hopkins*, 36 Tex. 687; *Edmondson v. Blessing*, 42 Tex. 596.

3 *Poole v. Gerrard*, 6 Cal. 71; *Dorsey v. McFarland*, 7 Cal. 342; *Revalk v. Kraemer*, 8 Cal. 66; *Dunn v. Tozer*, 10 Cal. 167; *Lies v. De Diablar*, 12 Cal. 327; *Best v. Allen*, 30 Ill. 30; *Marshall v. Baun*, 35 Ill. 106; *Vanzant*, 23 Ill. 536; *Yost v. Devault*, 6 Iowa, 60; *Morris v. Sargent*, 18 Iowa, 19; *Richards v. Chace*, 2 Gray, 383; *Dye v. Mann*, 10 Mich. 291; *Lawver v. Slingerhand*, 11 Minn. 447; *Williams v. Starr*, 5 Wis. 534; *Hart v. Honley*, 19 Wis. 472.

4 *Cross v. Everts*, 28 Tex. 532.

5 *Vanzant*, 23 Ill. 536; *Thornton v. Boyden*, 31 Ill. 200; *Redfern*, 38 Ill. 509; *Connor v. McMurray*, 2 Allen, 202; *Hoge v. Hollister*, 2 Tenn. Ch. 606. But see *Babcock v. Hoey*, 11 Iowa, 375; *Wing v. Hayden*, 10 Bush, 280.

6 See *Moore v. Dixon*, 35 Ill. 208, 236; *Martin v. Dwelly*, 6 Wend. 9; 21 Am. Dec. 245.

7 *Barber v. Babel*, 36 Cal. 11; *Sears v. Dixon*, 33 Cal. 326; *Larson v. Reynolds*, 13 Iowa, 579; *Alley v. Bay*, 9 Iowa, 509; *Ayres v. Probasco*, 14 Kan. 190; *Morris v. Ward*, 5 Kan. 239; *Boyle v. Coburn*, 6 Allen, 72; *Richards v. Chace*, 2 Gray, 385; *Dye v. Mann*, 10 Mich. 291; *Amphlett v. Hibbard*, 29 Mich. 298; *Kennedy v. Stacey*, 57 Tenn. 220; *Hoge v. Hollister*, 2 Tenn. Ch. 603; *Rogers v. Renshaw*, 37 Tex. 625; *Williams v. Starr*, 5 Wis. 534, 550; *Hait v. Houle*, 19 Wis. 472.

8 *McDonald v. Crandall*, 43 Ill. 231, 238; *Brown v. Coon*, 36 Ill. 243; *Hewitt v. Templeton*, 43 Ill. 367; *Vasey v. Trustees*, 59 Ill. 188; *Stewart v. Mackey*, 16 Tex. 56; *Jordan v. Godman*, 19 Tex. 273.

9 *Gee v. Moore*, 14 Cal. 472; *Benedict v. Webb*, 57 Ga. 348; *Heard v. Downer*, 47 Ga. 623. *Contra*, *Revalk v. Kraemer*, 8 Cal. 66, 76; *Larson v. Reynolds*, 13 Iowa, 579.

10 *Dickinson v. McLane*, 57 N. H. 31.

11 *Riehl v. Bingerheimer*, 28 Wis. 84.

12 *Revalk v. Kraemer*, 8 Cal. 66.

13 *Green v. Marks*, 25 Ill. 221; *post*, § 330.

14 *Charless v. Lamberson*, 1 Iowa, 439, 441.

15 *Thompson Homest.* § 42.

16 *Richards v. Greene*, 74 Ill. 54.

17 *Meech*, 37 Vt. 419; *Johnson v. Harrison*, 41 Wis. 381.

§ 329. **Rights of wife in and over the homestead.**—Over a homestead out of her husband's property a wife has during coverture no active rights,<sup>1</sup> and if the homestead be out of her separate property, she has no greater rights thereover, than the husband has when the homestead is out of his:<sup>2</sup> she cannot, for example, convey it without his joinder.<sup>3</sup> On the husband's death, she may as the head of the family, continue to hold a homestead in her own property,<sup>4</sup> or take a homestead in his, by survivorship as in California,<sup>5</sup> by descent as in Vermont,<sup>6</sup> or to hold under certain conditions, as in most of the States.<sup>7</sup> In Alabama, Illinois, Massachusetts, Missouri, Tennessee, Vermont, and Wisconsin, she may have the homestead in her husband's property and dower also,<sup>8</sup> but in Georgia, Iowa, and North Carolina, she cannot have both.<sup>9</sup> She may redeem the homestead from tax sale after discovery,<sup>10</sup> or perform her husband's executory contract of purchase.<sup>11</sup> During coverture her husband should join her in a suit respecting the homestead,<sup>12</sup> and she may sue alone in equity for its protection.<sup>13</sup> A purchase-money mortgage by the wife alone is a valid lien on the homestead.<sup>14</sup>

1 See *Foss v. Stracher*, 42 N. H. 40; *ante*, § 329. Though she may herself claim the exemption: *Cassell v. Ross*, 33 Ill. 245; *Helfenstein v. Cove*, 3 Iowa, 245; *Adams v. Beale*, 19 Iowa, 67.

2 See *Partie v. Stewart*, 50 Miss. 720; *ante*, § 322.

3 *Dollman v. Harris*, 5 Kan. 599.

4 See *Keyes v. Hill*, 30 Vt. 759.

5 *Taylor v. Hargous*, 4 Cal. 273; *Revalk v. Kraemer*, 8 Cal. 66, 73; *Tomkins*, 12 Cal. 114, 125.

6 *McClary v. Bixby*, 36 Vt. 269; *Howe v. Adams*, 28 Vt. 541; *Jewett v. Brock*, 31 Vt. 65; *Davis v. Andrews*, 30 Vt. 678.

7 *Hunter*, 3 La. An. 257; *O'Docherty v. McGloin*, 25 Tex. 72.

8 *McCuan v. Turrentine*, 48 Ala. 70; *Jordan v. Stickland*, 42 Ala. 315; *Chisholm*, 41 Ala. 327; *Walsh v. Reis*, 50 Ill. 477; *Bursen v. Goodspeed*, 60 Ill. 231; *Mercier v. Chace*, 11 Allen, 194; *Monk v. Capen*, 5



Allen, 143; Bates, 97 Mass. 392; Gragg, 5 Mo. 273; Merriman v. Laceyfield, 4 Heisk. 222; Chaplin v. Sawyer, 35 Vt. 290; Doane, 33 Vt. 649; Bresee v. Stiles, 22 Wis. 120.

9 Singleton v. Huff, 49 Ga. 584; Roff v. Johnson, 40 Ga. 555; Robson v. Lindrum, 17 Ga. 252; Adams, 46 Ga. 630; Meyer, 23 Iowa, 359; Butterfield v. Wicks, 44 Iowa, 310.

10 Adams v. Beale, 19 Iowa, 61.

11 McKee v. Wilcox, 11 Mich. 361.

12 Poole v. Gerrard, 6 Cal. 71; Dunn v. Tozer, 10 Cal. 170.

13 Comstock, 27 Mich. 93; Kelley v. Whitmore, 41 Tex. 647. But see Guid. 14 Cal. 507. *Contra*, Mallon v. Gates, 26 La. An. 619; Thoms, 45 Miss. 272.

14 Andrews v. Alcorn, 13 Kan. 354.

### § 330. Liabilities of homestead to claims of creditors.—

The homestead property is generally exempt from liability for debts,<sup>1</sup> but there are certain classes of debts which are privileged, and which are enumerated by Thompson as follows: (1) Debts and liens subsisting prior to the taking effect of the exemption law. (2) Debts created prior to the acquisition of the homestead. (3) Liens subsisting prior to the time when the premises became impressed with the homestead character. (4) Unpaid purchase money—vendor's lien. (5) Debts contracted in removing encumbrances. (6) Liens for the creation, improvement, and preservation of the property—mechanics', laborers', furnishers', landlords' liens. (7) Judgments in action *ex delicto*. (8) Public debts.<sup>2</sup> A discussion of these questions does not belong to the subject of this volume.

1 Green v. Marks, 25 Ill. 221; Delavan v. Pratt, 19 Iowa, 429; Morgan v. Stearns, 41 Vt. 398.

2 Thompson Homest. ch. 7.



## PART IV.

### THE STATUS OF MARRIED WOMEN.

- CHAP. XIX. THE STATUS OF MARRIED WOMEN, GENERALLY, §§ 331-339.
- XX. WILLS OF MARRIED WOMEN, §§ 340-354.
- XXI. CONTRACTS OF MARRIED WOMEN, §§ 355-393.
- XXII. DEEDS OF MARRIED WOMEN, §§ 394-403.
- XXIII. ESTOPPEL OF MARRIED WOMEN, §§ 409-420.
- XXIV. TORTS OF MARRIED WOMEN, §§ 421-425.
- XXV. CRIMES OF MARRIED WOMEN, §§ 426, 427.
- XXVI. SUITS OF MARRIED WOMEN, §§ 428-463.
- XXVII. MARRIED WOMEN TRADERS, §§ 464-481.
- XXVIII. MARRIED WOMEN IN REPRESENTATIVE CAPACITIES, §§ 482-487.

# CHAPTER XIX.

## THE STATUS OF MARRIED WOMEN, GENERALLY.

- § 331. General rule at common law, no legal existence.
- § 332. Capacities of wife abandoned by husband.
- § 333. Capacities of wife divorced *a mensa et thoro*.
- § 334. Capacities of wife of husband civilly dead.
- § 335. Capacities of wife of husband not *sui juris*.
- § 336. Capacities of wife acting in representative position.
- § 337. Capacities of wife in equity.
- § 338. Capacities of wife under statutes.
- § 339. Effect of additional disability of infancy, etc.

§ 331. Married women no legal existence, generally, at common law.—At common law a wife was under the power and authority of her husband;<sup>1</sup> her legal identity was merged into his,<sup>2</sup> and she had of herself no separate legal existence in the eye of the law.<sup>3</sup> Therefore, all her contracts were absolutely void;<sup>4</sup> her torts and crimes committed in her husband's presence were his rather than hers,<sup>5</sup> and she could neither sue nor be sued alone.<sup>6</sup> But the inconvenience of the strict application of this fiction gave rise to exceptions, and it became settled gradually that a married woman had more or less of the capacities of an unmarried woman,<sup>7</sup> when permanently abandoned by her husband,<sup>8</sup> when her husband was civilly dead,<sup>9</sup> or when she was divorced *a mensa et thoro*;<sup>10</sup> and when she acted in representative capacities.<sup>11</sup>

1 Adams v. Kellogg, Kirby, 195, 196; 1 Am. Dec. 18; Scarborough v. Watkins, 9 Mon. B. 540, 545; 50 Am. Dec. 528; *ante*, § 38.

2 Barron, 24 Vt. 375, 398; *ante*, § 38.

3 Willock v. Noble, Law R. 7 H. L. 580, 533, 603; *ante* § 38.

4 White v. Wager, 25 N. Y. 325, 323, 330; *post*, §§ 357, 368.

5 Whitman v. Delano, 6 N. H. 543, 545; Mulvey v. State, 43 Ala. 316, 318; *ante*, §§ 66, 68; *post*, §§ 421-425.

6 Tucker v. Scott, 3 N. J. L. 955; Hawes Parties, §§ 62-70; *post*, §§ 428-463.

7 These exceptions discussed: *Post*, §§ 332-338.

8 Gregory v. Paul, 15 Mass. 31, 32; Stewart M. & D. § 177; *post*, § 332.

9 Countess v. Prodgers, 2 Vern. 104, 105; Stewart M. & D. § 475, *post*, § 334.

10 Dean v. Richmond, 5 Pick. 461, 465, 466; Stewart M. & D. §§ 431, 440; *post*, § 333.

11 Hodsdon v. Lloyd, 2 Bro. C. C. 534, 543; Noble v. Willock, Law R. 8 Ch. App. 778, 787; *post*, §§ 336, 482-487.

### § 332. Wife's capacities when abandoned by her husband.

—When a husband has abjured the realm under the old common law, or has permanently abandoned his wife and the State by the present law, she has most of the capacities of a *femme sole*.<sup>1</sup> Thus, she may contract,<sup>2</sup> will,<sup>3</sup> sue,<sup>4</sup> and be sued<sup>5</sup> as such.

1 Discussed Stewart M. & D. §§ 175-177. In addition to cases there cited, see Rhea v. Rhenner, 1 Peters, 105, 107, 111; High v. Worley, 33 Ala. 196; Stillwell v. Adams, 29 Ark. 346; Rogers v. Phillips, 5 Ark. 366; 47 Am. Dec. 727; Way v. Peck, 47 Conn. 23; Gallagher v. Delargy, 57 Mo. 29, 37; Musick v. Dobson, 76 Mo. 624, 623; 43 Am. Rep. 789; Danner v. Berthold, 11 Mo. App. 351, 355; Lewis v. Perkins, 36 N. J. L. 133; Hinkson v. Williams, 41 N. J. L. 35, 37; Nash v. Mitchell, 71 N. Y. 199; 27 Am. Rep. 33; Boyce v. Owens, 1 Hill, 8, 10; Beckman v. Stanley, 8 Nev. 257, 261; Bean v. Morgan, 4 McCord, 148; Mason v. Jordan, 13 R. I. 193, 195; Yeatman v. Bellmain, 6 Lea, 489; *post*, §§ 342, 358, 394, 412, 441, 451.

2 Bean v. Morgan, 4 McCord, 143; *post*, § 353.

3 Countess v. Prodgers, 2 Vern. 104, 105; *post*, § 342.

4 Love v. Moynehan, 16 Ill. 273, 282; *post*, § 441.

5 Gregory v. Paul, 15 Mass. 31, 34; *post*, § 451.

### § 333. Capacities of wife divorced a mensa et thoro.—

After a divorce *a mensa et thoro* the woman has still a husband, and is not, therefore, a *femme sole*, and so in England she is held to remain under all the disabilities of coverture; but in the United States a different rule has been adopted, and she may generally contract, sue, be sued, etc., as if unmarried.<sup>1</sup>

1 Discussed in Stewart M. & D. § 449.

### § 334. Capacities of wife whose husband is civilly dead.

—When one is outlawed, banished, imprisoned for life, etc., he is civilly dead, and his wife has the capacities of a *femme sole*.<sup>1</sup> Thus, she may contract,<sup>2</sup> will,<sup>3</sup> sue,<sup>4</sup> and be sued,<sup>5</sup> as if unmarried.

- 1 Discussed Stewart M. & D. § 475.
- 2 Boyce v. Owens, 1 Mill, 8, 10; *post*, § 358.
- 3 Coward, 4 Swab. & T. 46; 34 Law J. Prob. 120; *post*, § 342.
- 4 Gregory v. Paul, 15 Mass. 31, 32; *post*, § 441.
- 5 Worthington v. Cooke, 52 Md. 237, 307; *post*, § 451.

§ 335. Capacities of wife when husband is not sui juris.

—As a general rule, the insanity, infancy, or other incapacity of a husband does not affect the personal status of his wife.<sup>1</sup> A deed by an infant husband and his wife of her property is voidable by him, and if avoided by him, void as to her also.<sup>2</sup> A husband's mere sickness or inability does not give his wife the power to act for him,<sup>3</sup> except so far as this is necessary for the support of his family or the preservation of his property;<sup>4</sup> and there can be no implication of her agency in fact if he is insane.<sup>5</sup> But if he is insane and confined in an asylum out of the State, she has the capacities of a *femme sole*, just as if he were civilly dead.<sup>6</sup> A statute which provides that when from drunkenness, profligacy, or other cause, a husband fails to provide for his wife, she may act as if sole, does not under "other cause" include insanity, but only some cause within the husband's control.<sup>7</sup>

- 1 There seem to be no cases just on this point.
- 2 Barber v. Wilson, 4 Heisk. 263, 269, 271.
- 3 Sawyer v. Cutting, 23 Vt. 486, 491.
- 4 *Ante*, § 90.
- 5 Alexander v. Miller, 16 Pa. St. 215, 220.
- 6 Gustin v. Carpenter, 51 Vt. 585, 587.
- 7 Edson v. Hayden, 20 Wis. 682, 684.

§ 336. Capacities of a married woman acting in a representative position.—When a married woman acts as trustee, guardian, administratrix or executrix, agent, or any representative capacity,<sup>1</sup> two questions may arise: first, how far she is under disability as to her personal responsibilities—how far she is personally

bound and has personal rights; and second, how far she is under disability as to the person or the estate which she represents. As a rule, the fact that she acts in a representative capacity does not affect her personal status or give her the right to bind herself personally, but it does give her the power to bind the person or estate she represents as if she were a *femme sole*.<sup>2</sup> Thus, she would not be liable personally to her principal for money collected by her as agent,<sup>3</sup> though her receipt given as agent to the debtor would be a full discharge.<sup>4</sup> Of course, she can bind herself personally for torts connected with an estate held by her in a representative capacity,<sup>5</sup> for she can commit torts even at common law;<sup>6</sup> and so her husband is liable with her for her *devastavit*.<sup>7</sup> And for conformity her husband is generally joined with her in suits respecting or arising out of her dealings as trustee, etc.<sup>8</sup>

1 Discussed *post*, ch. xxviii. §§ 482-487.

2 See *Hodsden v. Lloyd*, 2 Bro. C. C. 534, 543; *Willock v. Noble*, Law R. 7 H. L. 580, 589; *Scammell v. Wilkinson*, 2 East, 556, 557; *Adams v. Kellogg*, Kirby, 195, 197; 1 Am. Dec. 18; *Lee v. Bennett*, 31 Miss. 119, 126; *Cutter v. Butler*, 25 N. H. 343, 353; 57 Am. Dec. 330; West, 3 Rand. 373, 375.

3 *Andrews v. Ormsbee*, 11 Mo. 400, 402; *Carleton v. Haywood*, 49 N. H. 314, 320.

4 For a married woman may be an agent: *Ante*, §§ 89-98; *post*, § 484.

5 *Bohe v. Frowner*, 18 Ala. 80, 95; *ante*, § 66, n. 23.

6 Discussed *post*, §§ 421-425.

7 *Phillips v. Richardson*, 4 Marsh. J. J. 212, 215; *Ferguson v. Collins*, 8 Ark. 241, 252.

8 *Buck v. Fisher*, 2 Colo. 709, 710; *Ludlow v. Marsh*, 3 N. J. L. 983; *Byrne v. Van Hoesen*, 5 Johns. 66; *Mitchell v. Wright*, 4 Tex. 283; *post*, §§ 439, 449.

§ 337. *Wife's capacities in equity.*—Great inconvenience was found to result from the fiction of the non-existence, in the eye of the law, of wives; and courts of equity, from the earliest times, recognized their legal existence with respect to property settled on them to their sole and separate use;<sup>1</sup> so that with respect to

such property married women have always had many of the capacities of unmarried women.<sup>2</sup> But these capacities were limited to the aforesaid property;<sup>3</sup> a wife has no greater personal capacity in equity than at law.<sup>4</sup>

1 Rosenthal v. Mayhugh, 33 Ohio St. 155, 165.

2 Discussed *ante*, §§ 197-216.

3 Johnson v. Cummings, 16 N. J. Eq. 97, 106; *ante*, § 206.

4 Butler v. Buckingham, 5 Day, 492, 501; 5 Am. Dec. 174.

§ 338. **Wife's capacity under statutes.**—It is to statutes to-day that we must look, for the most part, in order to determine the status of married women. For in all the States the common-law system of coverture has been more or less destroyed by legislation. The main difficulty lies in determining how far a particular statute has modified the pre-existing law.<sup>1</sup>

1 Discussed *ante*, §§ 10-18; *post*, §§ 340, *et seq.*

§ 339. **Double disability—Coverture and infancy, etc.**—When a party labors under several disabilities, each must be considered by itself, and must be given as great effect as if it existed by itself.<sup>1</sup> In the absence of express legislation, neither a man nor a woman attains full age by marrying,<sup>2</sup> although a marriage with the parents' consent emancipates an infant,<sup>3</sup> and gives such infant the right to his or her earnings,<sup>4</sup> and although at common law guardianship, as well of person as of property of a female infant, ceased on her marriage,<sup>5</sup> because inconsistent with the husband's rights;<sup>6</sup> or rather, it passed to her husband,<sup>7</sup> as guardianship of person still does<sup>8</sup> (though a husband has been held to have no greater right than a third party to be appointed guardian of an insane wife<sup>9</sup>), while under separate property acts the husband is no longer guardian of his wife's property, and therefore the reason for this part of the rule is gone.<sup>10</sup> A statute which



enables a married woman to make certain contracts if of "full age," means full age generally, not full age for marrying.<sup>11</sup> The husband of an infant has the same marital rights and liabilities as the husband of an adult.<sup>12</sup> Infancy and coverture are separate and distinct disabilities, and each must be considered by itself.<sup>13</sup> They may exist separately, or they may co-exist. When they co-exist, the removal of the one in no way is a removal of the other;<sup>14</sup> and the same applies to insanity and coverture, etc.<sup>15</sup> Thus, a statute authorizing deeds by married women does not affect the invalidity of an infant married woman's deed due to her infancy;<sup>16</sup> and an infant married woman's deed of dower,<sup>17</sup> or of her own separate property,<sup>18</sup> made in accordance with a married woman's act, is voidable.<sup>19</sup> And the same rule applies to statutes enabling married women to will,<sup>20</sup> or to sue and be sued.<sup>21</sup> On the other hand, a deed of an infant married woman, not valid under the married woman's act,<sup>22</sup> is absolutely void, and cannot be ratified by the married woman on attaining full age.<sup>23</sup> The deed of an infant married woman being voidable for infancy, the question arises whether it can be avoided or confirmed while the disability of coverture continues.<sup>24</sup> The general rule at common law, and even under modern acts,<sup>25</sup> since the coercion of the husband over the wife is not destroyed,<sup>26</sup> is that the wife cannot confirm the deed, except by a new deed executed in accordance with the married woman's acts after attaining full age,<sup>27</sup> until both of her disabilities have been removed;<sup>28</sup> that is to say, until she has attained full age, and coverture has been terminated by death<sup>29</sup> or divorce.<sup>30</sup> A statute which enables a woman to confirm her deeds during coverture does not compel her so to do.<sup>31</sup> But as to statutory separate property, a married woman may be estopped;<sup>32</sup>

and it seems that by her conduct during coverture, after attaining full age, she may estop herself from avoiding her deed after the determination of coverture.<sup>33</sup> Neither can she, it is said, during coverture, disaffirm her deed by any act *in pais*;<sup>34</sup> but a husband can disaffirm a deed of his wife's in which he as infant joined.<sup>35</sup> Still, by making another conveyance during coverture,<sup>36</sup> or by bringing suit for the land,<sup>37</sup> she may disaffirm her deed; and under modern statutes it is said she may disaffirm her deeds generally during coverture.<sup>38</sup> She need not restore the consideration.<sup>39</sup> But she must not delay her avoidance beyond a reasonable time after the cessation of coverture.<sup>40</sup> A statute validating deeds of infant married women is not retrospective in its operation.<sup>41</sup> The effect of a double disability under the Statute of Limitations is elsewhere discussed.<sup>42</sup>

1 *Scranton v. Stewart*, 52 Ind. 68, 91; *Adams v. Palmer*, 51 Me. 480, 488; *Bool v. Mix*, 17 Wend. 119, 129. See *Schouler Dom. Rel.* 426; 2 Bish. M. W. ‡ 513, 516, 524; *Macpher. Inf.* 113; *Sims v. Everhart*, 101 U. S. 300, 311; *Greenwood v. Coleman*, 34 Ala. 150, 151; *Whitman v. Abernathy*, 33 Ala. 154, 159; *Watson v. Billings*, 38 Ark. 278, 280; 42 Am. Rep. 1; *Magee v. Welsh*, 18 Cal. 155, 159; *Hoyt v. Swan*, 53 Ill. 134, 140; *Buchanan v. Hubbard*, 96 Ind. 1, 3, 5; *Sims v. Bardoner*, 86 Ind. 87, 97; *Sims v. Smith*, 86 Ind. 577, 581; *Stringer v. Northwestern*, 82 Ind. 100, 108; *Low v. Long*, 41 Ind. 586, 595; *Miles v. Lingerian*, 24 Ind. 385, 387; *Hartman v. Kendall*, 4 Ind. 403, 404; *Oldham v. Sale*, 1 Mon. B. 76, 77; *Prewitt v. Graves*, 5 Marsh. J. J. 115, 120; *Phillips v. Green*, 3 Marsh. A. K. 7, 11; 5 Mon. 344, 350; *Webb v. Hall*, 35 Me. 336, 338; *Adams v. Palmer*, 51 Me. 480, 488; *Glenn v. Clark*, 53 Md. 580, 603, 604; *Kendall v. Lawrence*, 22 Pick. 540, 543; *Chandler v. McKinney*, 6 Mich. 217, 220; *Dixon v. Merritt*, 21 Minn. 196, 199, 200; *Markham v. Merrett*, 8 Miss. 437, 444; *Youse v. Norcums*, 12 Mo. 549, 564; 51 Am. Dec. 175; *Norcums v. Cheatham*, 21 Mo. 25, 29; *Ross v. Adams*, 28 N. J. L. 160, 163; *Porce v. Fries*, 18 N. J. Eq. 204, 208; *Sanford v. McLean*, 3 Paige, 117, 121, 122; *Zimmerman v. Schoenfeldt*, 3 Hun, 692, 698; *McIlvaine v. Kadel*, 30 How. Pr. 193, 195; *Sherman v. Garfield*, 1 Denio, 329, 330; *Priest v. Cummings*, 20 Wend. 338, 349; *Cresinger v. Welch*, 15 Ohio St. 159, 191; *Card v. Patterson*, 5 Ohio St. 319, 324; *Drake v. Ramsay*, 5 Ohio, 251, 252; *Hughes v. Watson*, 10 Ohio, 127, 134; *Williams v. Baker*, 71 Pa. St. 476, 482; *Shrader v. Decker*, 9 Pa. St. 4, 16; *Tillinghast v. Holbrook*, 7 R. I. 230, 233; *McMorris v. Webb*, 17 S. C. 558, 562; 43 Am. Rep. 629; *Matherson v. Davis*, 2 Cold. 443, 448, 450; *Barker v. Wilson*, 4 Heisk. 268, 269, 271; *Dodd v. Benthall*, 4 Heisk. 601, 607; *Thomas v. Gammel*, 6 Leigh, 9, 12; *Armstrong v. Walkup*, 12 Gratt. 608, 613.

2 *McMorris v. Webb*, 17 S. C. 558, 562; 43 Am. Rep. 629; 2 Bish. M. W. ‡ 513.

3 *Bricksport v. Rockland*, 56 Me. 22, 23; *Taunton v. Plymouth*, 15 Mass. 203, 204; *Burr v. Wilson*, 18 Tex. 367, 370.

4 *Supra*, n. 3. But see *White v. Henry*, 24 Me. 531, 533.

5 *Nicholson v. Wilborn*, 13 Ga. 467, 471; *Post*, 47 Ind. 142, 143; *Bartlett v. Cowles*, 15 Gray, 445, 446; *Porce v. Fries*, 18 N. J. Eq. 204, 207, 208; *Cummings*, 11 Pa. St. 272, 274; *Jones v. Ward*, 10 Yerg. 160, 171; *Burr v. Wilson*, 18 Tex. 367, 375; *Armstrong v. Walkup*, 12 Gratt. 608, 613.

6 *Porce v. Fries*, 18 N. J. Eq. 204, 207; *supra*, n. 5.

7 *Burr v. Wilson*, 18 Tex. 367, 375; *supra*, n. 5.

8 *Cummings*, 11 Pa. St. 272, 274.

9 *Fegan*, 45 Cal. 176, 177.

10 *Cummings*, 11 Pa. St. 272, 274.

11 *McMorris v. Webb*, 17 S. C. 558, 562; 43 Am. Rep. 629.

12 *Nicholson v. Wilborn*, 13 Ga. 467, 470.

13 *Sims v. Bardoner*, 86 Ind. 87, 97; *Adams v. Palmer*, 51 Me. 480, 488; *Bool v. Mix*, 17 Wend. 119, 129; 31 Am. Dec. 285; *supra*, n. 1.

14 *Watson v. Billings*, 38 Ark. 278, 280; 42 Am. Rep. 1; *Adams v. Palmer*, 57 Me. 480, 488; *supra*, n. 1.

15 *Webb v. Hall*, 35 Me. 336, 338; *Adams v. Palmer*, 51 Me. 480, 488; *Bool v. Mix*, 17 Wend. 119, 133; 31 Am. Dec. 285.

16 *Hughes v. Watson*, 10 Ohio, 127, 134; *supra*, n. 1.

17 *Glenn v. Clark*, 53 Md. 580, 603, 604; cases *ante*, § 271; *supra*, n. 1.

18 *Greenwood v. Coleman*, 34 Ala. 150, 154; *Sims v. Bardoner*, 86 Ind. 87, 90; *Low v. Long*, 41 Ind. 586, 595; *Phillips v. Green*, 5 Mon. 344, 350; *Webb v. Hall*, 35 Me. 336, 338; *Sanford v. McLean*, 3 Paige, 117, 121, 122; *Bool v. Mix*, 17 Wend. 119, 130; 31 Am. Dec. 285; *Card v. Patterson*, 5 Ohio St. 319, 324; *Burr v. Wilson*, 18 Tex. 367, 375.

19 *Cresinger v. Welch*, 15 Ohio, 159, 191; 45 Am. Dec. 566. S. P., *Watson v. Billings*, 38 Ark. 278, 280; *Sims v. Bardoner*, 86 Ind. 87, 90; *Adams v. Palmer*, 57 Me. 480, 488; *Youse v. Norcums*, 12 Mo. 549, 560, 563; 51 Am. Dec. 175; *Card v. Patterson*, 5 Ohio St. 319, 324; *ante*, § 271.

20 *Zimmerman v. Schoenfeldt*, 3 Hun, 692, 698.

21 *Wood*, 2 Palge, 108; 2 Blsh. M. W. § 303. But see *Jones*, 18 Me. 308, 313; 36 Am. Dec. 723.

22 *Post*, ch. xxii., §§ 394-408.

23 *Scranton v. Stewart*, 52 Ind. 68, 90.

24 *Buchanan v. Hubbard*, 96 Ind. 1, 5.

25 *Scranton v. Stewart*, 52 Ind. 68, 93; *infra*, n. 28. But see *infra*, n. 33.

26 *Miles v. Lingerman*, 24 Ind. 385, 388; *Scranton v. Stewart*, 52 Ind. 68, 92; *Dodd v. Benthall*, 4 Heisk. 601, 607; *ante*, §§ 14, 62, 66, 68, 121.

27 *Miles v. Lingerman*, 24 Ind. 385, 388; *Williams v. Baker*, 71 Pa. St. 476, 483.

28 *Sims v. Everhart*, 102 U. S. 300, 309, 310; *Magee v. Welsh*, 18 Cal. 155, 159; *Sims v. Bardoner*, 86 Ind. 87, 91, 97; *Sims v. Smith*, 86 Ind. 577, 579; *Youse v. Norcums*, 12 Mo. 549, 564; 51 Am. Dec. 175; *Dodd v. Benthall*, 4 Heisk. 601, 607; *Matherson v. Davis*, 2 Cold. 443, 448-450.

29 *Hartman v. Kendall*, 4 Ind. 401, 404.

- 30 Sims *v.* Everhart, 101 U. S. 300, 311.
- 31 Miles *v.* Lingerman, 24 Ind. 335, 338.
- 32 Discussed fully *post*, ch. xxiii., §§ 409-423.
- 33 See Sims *v.* Everhart, 102 U. S. 300, 307; Scranton *v.* Stewart, 17 Ind. 68, 93; Stringer *v.* Northwestern, 82 Ind. 100, 108.
- 34 Dodd *v.* Benthal, 4 Heisk. 601, 607. See McIlvaine *v.* Kadel, 30 How. Pr. 193, 195.
- 35 Barker *v.* Wilson, 4 Heisk. 263, 269-271.
- 36 Youse *v.* Norcums, 12 Mo. 549, 564; 51 Am. Dec. 175; Norcums *v.* Cheatham, 21 Mo. 25, 29; Ross *v.* Adams, 28 N. J. L. 160, 163. *Contra*, Low *v.* Long, 41 Ind. 586, 597.
- 37 Webb *v.* Hall, 35 Me. 336, 333.
- 38 Buchanan *v.* Hubbard, 96 Ind. 1, 3.
- 39 Buchanan *v.* Hubbard, 96 Ind. 1, 4; Low *v.* Long, 41 Ind. 586, 600; Miles *v.* Lingerman, 24 Ind. 385, 387; Markham *v.* Merritt, 8 Miss. 437, 441.
- 40 Sims *v.* Bardoner, 86 Ind. 87, 93; Scranton *v.* Stewart, 52 Ind. 68, 96; *supra*, n. 28.
- 41 Adams *v.* Palmer, 51 Me. 480, 489.
- 42 *Post*, § 445.

## CHAPTER XX.

## WILLS OF MARRIED WOMEN.

- § 340. Testamentary law as applied to married women.
- § 341. Wills of married women at common law, generally.
- § 342. Wills of married women at common law, exceptions.
- § 343. Wills of married women in equity.
- § 344. Wills of equitable separate property.
- § 345. Wills of married women under statutes.
- § 346. Wills of statutory separate property.
- § 347. Validity and operation of wills distinguished.
- § 348. Effect of husband's consent to wife's will.
- § 349. Mutual wills of husband and wife.
- § 350. Gifts *causa mortis* of married women.
- § 351. Revocation of will by married woman.
- § 352. Wills made by woman before her marriage.
- § 353. Wills republished after dissolution of marriage.
- § 354. Conflict of laws as to wills.

### § 340. Testamentary law, as applied to married women.

—By the common law, before the statute of wills, the right of testamentary disposition of property did not extend to real estate; and as to personalty, it was limited, unless the testator had neither wife nor children.<sup>1</sup> This statute was held not applicable to married women,<sup>2</sup> because they were regarded as without will of their own, and under the power of their husbands,<sup>3</sup> and because a power in them to will would have conflicted with the husband's marital rights.<sup>4</sup> As to personalty, they had no power to will independently of statute, because such property vested in the husband absolutely by marriage.<sup>5</sup> Therefore, a married woman's power to will must be found in an express statute,<sup>6</sup> or in some circumstances which relieve her of the disabilities of coverture.<sup>7</sup>

<sup>1</sup> Redf. Wills, 3; 2 Blackst. Com. 492; *post*, § 345.

<sup>2</sup> Calverlye, Dyer, 351 *b*; Marston v. Norton, 5 N. H. 205, 211; *post*, § 341.

H. & W. — 44.

3 *Burton v. Holly*, 18 Ala. 408, 411; *Marston v. Norton*, 5 N. H. 205, 211.

4 *Willock v. Noble*, Law R. 7 H. L. 580, 589, 603.

5 *Cutter v. Butler*, 25 N. H. 343, 354, 356; 57 Am. Dec. 330.

6 *Warner*, 37 Vt. 356, 368; *post*, § 345.

7 *Willock v. Noble*, Law R. 7 H. L. 580, 590; *post*, § 342.

§ 341. Wills of married women at common law, generally. — At common law the will of a married woman was, generally, a mere nullity,<sup>1</sup> because by marriage her legal existence was merged in that of her husband;<sup>2</sup> she had no separate disposing power;<sup>3</sup> she was not *sui juris*;<sup>4</sup> she was not a free agent,<sup>5</sup> but was under the power and control of her husband;<sup>6</sup> her incapacity depended also on the fact that she had nothing to dispose of, it is said.<sup>7</sup> The disability of coverture in respect to wills differs materially from that of infancy, idiocy, or lunacy;<sup>8</sup> and though it be removed, any other disability will remain.<sup>9</sup>

1 *Steadman v. Powell*, 1 Addis. 58, 60; *Tucker v. Nunan*, 4 Man. & G. 1049; *Fane*, 16 Sim. 406; *Cutter v. Butler*, 25 N. H. 343, 350; 57 Am. Dec. 330; *VanWinkle v. Schoonmaker*, 15 N. J. Eq. 385, 386; *infra*, notes 2-7.

2 *Hood v. Archer*, 1 McCord, 225, 226.

3 *Willock v. Noble*, Law R. 7 H. L. 580, 589.

4 *Marston v. Norton*, 5 N. H. 205, 212.

5 *Wakefield v. Phelps*, 37 N. H. 295, 299.

6 *Adams v. Kellogg*, Klrby, 195, 196; 1 Am. Dec. 18; *Burton v. Holly*, 18 Ala. 408, 411; *Marston v. Norton*, 5 N. H. 205, 211.

7 *Willock v. Noble*, Law R. 7 H. L. 580, 603.

8 1 Jarman Wills, 38.

9 *Zimmerman v. Schoenfeldt*, 3 Hun, 692, 698; *ante*, § 332.

§ 342. Wills of married woman at common law, exceptions. — At common law a married woman who, owing to peculiar circumstances, had the capacities of a *femme sole*,<sup>1</sup> could make a will;<sup>2</sup> as where her husband was civilly dead,<sup>3</sup> being, for example, banished for life;<sup>4</sup> but the adultery and desertion of her husband did not enable her to make a will,<sup>5</sup> So when she was acting in a

representative capacity, for example, as executrix, she could make a will;<sup>6</sup> or where she was acting for and in the place of another, as when she made a will of personality with her husband's consent,<sup>7</sup> or under a power.<sup>8</sup> For there is no question of the right of a married woman to execute a power of any kind;<sup>9</sup> she may will realty even, under a power given by a mere agreement between her and her husband before marriage;<sup>10</sup> and when she acts under a power the whole doctrine of disability by coverture is eliminated.<sup>11</sup> In executing a power she need not conform to the requirements of married women statutes,<sup>12</sup> or have the consent or joinder of her husband;<sup>13</sup> she may execute it in favor of her husband;<sup>14</sup> her mode of executing it, and her right to do so, are unaffected by married women's enabling acts.<sup>15</sup> But she must refer to the power, unless the will would be of no effect otherwise;<sup>16</sup> and a power "to sell, use, or exchange" is not a power to will.<sup>17</sup> She may revoke a will made under a power by another subsequent will.<sup>18</sup> But any paper which is to take effect as a will must be probated.<sup>19</sup>

1 Discussed *ante*, §§ 332-335.

2 See *Cutter v. Butler*, 25 N. H. 343, 350-354; 57 Am. Dec. 330.

3 Coward, 4 Swab. & T. 46; 34 Law J. Prob. 120; *Cutter v. Butler*, 25 N. H. 343, 353; 57 Am. Dec. 330. Consult *Martin*, 2 Rob. 405; 15 Jur. 686; *Coombs v. Queen*, 2 Rob. 547; 16 Jur. 820; *Harrington*, 29 Beav. 24; *Franks*, 1 Maule & S. 11; 7 Bing. 762; *Atlee v. Hook*, 23 Law J. Ch. 776; *Gough v. Davies*, 2 Kay & J. 625, 627; *ante*, § 334.

4 *Countess v. Prodgers*, 2 Vern. 104, 105.

5 *Vreeland v. Ryno*, 26 N. J. Eq. 160, 163.

6 *Hodsden v. Lloyd*, 2 Bro. C. C. 534, 543; *Adams v. Kellogg*, Kirby, 195, 197; 1 Am. Dec. 13; *Scammell v. Wilkinson*, 2 East, 556, 557; *Willock v. Noble*, Law R. 7 H. L. 580, 589; *Lee v. Bennett*, 31 Miss. 119, 126; *Cutter v. Butler*, 25 N. H. 343, 353; 57 Am. Dec. 330; *West*, 3 Rand. 373, 375.

7 *Marston v. Norton*, 5 N. H. 205, 210; *post*, § 348.

8 *Noble v. Willock*, Law R. 8 Ch. 778, 787; *Ross v. Ewer*, 3 Atk. 156, 160; *Picquet v. Swan*, 4 Mason, 443, 461; *Anderson v. Miller*, 6 Marsh. J. 563, 573; *George v. Bussing*, 15 Mon. B. 558, 563; *Mory v. Michael*, 18 Md. 227, 241; *Schley v. McCeney*, 36 Md. 267, 273; *Holman v. Perry*, 4 Met. 492, 498; *Osgood v. Breed*, 12 Mass. 525, 532; *Cutter v. Butler*, 25 N. H. 343, 354, 355, 353; 57 Am. Dec. 330; *Bradish v. Gibbs* 3

Johns. Ch. 523, 540; Newlin v. Freeman, 1 Ired. 514, 520; Jones v. Shields, 14 Ohio, 359; Wagner, 2 Ashm. 448, 451; Barnes v. Irwin, 2 Dall. 199, 201; 1 Am. Dec. 278; West, 10 Serg. & R. 445, 447; West, 3 Rand. 373, 375; Thorndike v. Reynolds, 22 Gratt. 21; *ante*, § 208.

9 Schley v. McCeney, 36 Md. 267, 273.

10 Bradish v. Gibbs, 3 Johns. Ch. 523, 540; Barnes v. Irwin, 2 Dall. 199, 203; 1 Am. Dec. 278; West, 10 Serg. & R. 445, 447.

11 Noble v. Willock, Law R. 8 Ch. 778, 787.

12 Schley v. McCeney, 36 Md. 267, 274.

13 Schley v. McCeney, 36 Md. 267, 274; *ante*, § 208.

14 Bradish v. Gibbs, 3 Johns. Ch. 523, 540; *ante*, §§ 50, 208.

15 George v. Bussing, 15 Mon. B. 538, 563.

16 Mory v. Michael, 18 Md. 227, 241; *ante*, § 208.

17 Harris v. Harbeson, 9 Bush, 397, 402.

18 Hawksley v. Barrow, Law R. 1 Pro. & D. 147, 152; *post*, § 351.

19 Stone v. Forsyth, 2 Doug. 707; Ross v. Ewer, 3 Atk. 156, 160; Picquet v. Swan, 4 Mason, 443, 461; Cutter v. Butler, 25 N. H. 343, 350; 57 Am. Dec. 320; Newlin v. Freeman, 1 Ired. 514, 520.

§ 343. Wills of married women in equity. — Since courts of equity have long recognized the separate existence and separate property of married women,<sup>1</sup> the reasons for the incapacity to will under the common law do not exist in equity,<sup>2</sup> and married women's wills of equitable and separate estate are very common.<sup>3</sup> So wills which are valid only through the consent of the husband are sustained only in equity.<sup>4</sup>

1 Discussed *ante*, §§ 8, 42, 197-216.

2 See *ante*, § 311.

3 *Ante*, § 203; *post*, § 344.

4 Bradish v. Gibbs, 3 Johns. Ch. 523, 540; *post*, § 348.

§ 344. Wills of equitable separate estate. — As to a married woman's wills of her equitable separate estate there are three views, corresponding to the three views of her power over such estate generally:<sup>1</sup> (1) That she stands towards this estate precisely as a *femme sole*, and can will it, be it real or personal;<sup>2</sup> this is the English and the common view.<sup>3</sup> (2) That she has over this estate only the powers given her by the instrument creating it, and can will it only under a power.<sup>4</sup>



(3) That she has the powers of a *femme sole* over the personalty and the profits of the realty, but none over the realty itself, except such as are given by the instrument creating the estate.<sup>5</sup> Her right to will, when it exists, includes the right to destroy the husband's curtesy,<sup>6</sup> to will to the husband himself,<sup>7</sup> and to appoint an executor.<sup>8</sup>

1 Discussed *ante*, §§ 203, 208.

2 Willock v. Noble, Law R. 7 H. L. 580, 590; Cutter v. Butler, 25 N. H. 343, 351; 27 Am. Dec. 330; Bradish v. Gibbs, 3 Johns. Ch. 523, 540; Barnes v. Irwin, 2 Dall. 199, 203; 1 Am. Dec. 278; *infra*, n. 3; *ante*, § 208.

3 Taylor v. Meade, 4 DeGex, J. & S. 597, 607; Pride v. Bubb, Law R. 7 Ch. 64, 69; Cooper v. McDonald, 7 Ch. D. 288, 296; Rich v. Cockell, 9 Ves. 369, 374; Hall v. Waterhouse, 5 Giff. 64, 68; Braham v. Burchell, 3 Addis. 343, 363; Pool v. Blakie, 53 Ill. 495, 502; Michael v. Mory, 12 Md. 158, 169; *supra*, n. 2; *ante*, § 208.

4 Wagner, Ashm. 448, 451; *ante*, §§ 208, 342.

5 West, 3 Rand. 373, 375; *ante*, § 208.

6 Cooper v. McDonald, 7 Ch. D. 288, 296; Pool v. Blakie, 53 Ill. 495, 502, 503; *ante*, §§ 157, 212.

7 Burton v. Holly, 18 Ala. 408, 411, 412; *ante*, § 50.

8 Churchill v. Dibben, 9 Sim. 447, 452.

§ 345. Wills of married women under statutes.—General statutes as to wills do not affect the capacity of married women.<sup>1</sup> A statute authorizing a wife to will generally has been held not to authorize a will to her husband;<sup>2</sup> but the soundness of this rule is questionable.<sup>3</sup> A statute authorizing her to will her "separate property" includes whatever property the legislature may afterwards declare separate.<sup>4</sup> A separate property act, which says nothing as to wills, does not authorize wills,<sup>5</sup> though a contrary view is sometimes taken.<sup>6</sup> A statute which authorizes conveyances by implication excludes wills.<sup>7</sup> An enabling act does not take away the power to execute a will in accordance with the common-law rules.<sup>8</sup> A statute which is declaratory of the common law is construed in accordance therewith, so that when the husband's consent is

required a particuar consent is meant.<sup>6</sup> A statute prohibiting a husband from witnessing his wife's will does not render it unlawful for him to be present when she executes her will.<sup>10</sup> These statutes are said to be strictly construed,<sup>11</sup> but this rule must be taken with qualifications.<sup>12</sup>

1 Adams v. Kellogg, Kirby, 195, 196; 1 Am. Dec. 18; Baker v. Chastang, 18 Ala. 417, 423; Reese v. Cochran, 10 Ind. 195, 197; Osgood v. Breed, 12 Mass. 525, 530; Marston v. Norton, 5 N. H. 205, 210; Cutter v. Butler, 28 N. H. 343, 352; 57 Am. Dec. 330; Wakefield v. Phelps, 37 N. H. 295, 300; *ante*, § 13. But see Noble v. Enos, 19 Ind. 42, 44; Bennett v. Hutchinson, 11 Kan. 398, 410; Allen v. Little, 5 Ohio, 65.

2 Fetch v. Brainard, 2 Day, 163, 189; Wakefield v. Phelps, 37 N. H. 295, 305.

3 Wakefield v. Phelps, 37 N. H. 295, 302; *ante*, § 50; *post*, § 349.

4 Emmert v. Hays, 89 Ill. 1, 13, 14.

5 Cain v. Bunkley, 35 Miss. 119, 145; Compton v. Pierson, 28 N. J. Eq. 229, 231; Naylor v. Field, 29 N. J. L. 281, 288.

6 Mosser, 32 Ala. 551, 555. Consult *ante*, §§ 236, 240.

7 Harker v. Elliott, 3 Har. (Del.) 51, 59. Compare *ante*, § 204.

8 Buchanan v. Turner, 26 Md. 1, 7.

9 Kurtz v. Saylor, 20 Pa. St. 205, 209.

10 Dickinson, 61 Pa. St. 401, 406.

11 Compton v. Pierson, 28 N. J. Eq. 229, 231.

12 Discussed *ante*, § 16.

§ 346. **Wills of statutory separate property.**—In most of the States the separate property acts provide for the willing of separate property.<sup>1</sup> Whether a statute which says nothing of disposition by will, but secures her property to her as a *femme sole*, enables her to will it, is doubtful,<sup>2</sup> the decisions not being directly in point, as those relating to equitable property are.<sup>3</sup> But few cases seem to have arisen, and some of them are cited hereunder.<sup>4</sup>

1 See *ante*, § 218; 3 Jarman on Wills.

2 *Pro*, Mosser, 32 Ala. 551, 555. *Contra*, Cain v. Bunkley, 35 Miss. 119, 145; Naylor v. Field, 29 N. J. L. 287, 288; Compton v. Pierson, 28 N. J. Eq. 229, 231; *ante*, § 240.

3 See *ante*, § 344.

4 Mosser, 32 Ala. 551, 555; Harker v. Elliott, 3 Har. (Del.) 51, 59; Cavanaugh v. Ainchbacker, 36 Ga. 500, 507; Urquhart v. Oliver, 56 Ga. 344, 347; Emmert v. Hays, 89 Ill. 1, 13, 14; Tuller, 79 Ill. 99, 101;

*Noble v. Enos*, 19 Ind. 42, 44; *Reese v. Cochran*, 10 Ind. 195, 197; *Bennett v. Hutchinson*, 11 Kan. 397, 408; *Schull v. Murray*, 32 Md. 9, 16; *Buchanan v. Turner*, 26 Md. 1, 7; *Burroughs v. Nutting*, 105 Mass. 228; *Marshall v. Berry*, 13 Allen, 43; *Silshy v. Bullock*, 10 Allen, 94; *Heath v. Withington*, 6 Cush. 497; *Osgood v. Breed*, 12 Mass. 525, 530; *Stewart v. Ross*, 50 Miss. 776; *Cain v. Bunkley*, 35 Miss. 119, 145; *Wakefield v. Phelps*, 37 N. H. 295, 299-302; *Cutter v. Butler*, 25 N. H. 343, 353; 57 Am. Dec. 330; *Sanborn v. Batchelder*, 51 N. H. 426, 431; *Compton v. Pierson*, 28 N. J. Eq. 229, 231; *Vreeland v. Ryno*, 26 N. J. Eq. 160, 162; *Waters v. Cullen*, 2 Bradf. 354; *Beal v. Storm*, 26 N. J. Eq. 160, 162; *Huston v. Cone*, 24 Ohio St. 11, 20, 22; *Allen v. Little*, 5 Ohio, 65; *Kurtz v. Saylor*, 20 Pa. St. 205, 209; *Clarke*, 79 Pa. St. 376, 377; *Dickinson*, 61 Pa. St. 401, 406; *Stroud v. Connelly*, 33 Gratt. 216, 220; *Thorndike v. Reynolds*, 22 Gratt. 21, 29; *Warner*, 37 Vt. 356, 368.

§ 347. **Validity and operation of wills distinguished.**— A distinction must be made between the validity and the operation of a married woman's will. At common law she could not will, first, because she had no legal capacity,<sup>1</sup> and second, because during her husband's life she had no property for a will to act upon;<sup>2</sup> and on the one hand we find her wills sustained when she has no capacity, as where she disposes of her husband's property, whether held in her right,<sup>3</sup> or in his own,<sup>4</sup> with his consent,<sup>5</sup> while on the other we find a perfectly valid will inoperative as to certain property, for example, to property which passes to her husband by survivorship.<sup>6</sup> It would seem that when her power to will is given by the instrument or statute which secures the property to her separate use, she can will the whole of the same and defeat the marital rights of her husband; but that when her incapacity to will is removed by statute generally, her will operates only so far as it does not conflict with the marital rights of her husband.<sup>5</sup> In probating a married woman's will, its operation must be limited to the kinds of property which it is in her power to dispose of.<sup>9</sup>

1 *Marston v. Norton*, 5 N. H. 205, 211; *ante*, § 341.

2 *Willock v. Noble*, Law R. 7 H. L. 580, 603.

3 *Cutter v. Butler*, 25 N. H. 343, 354, 356; 57 Am. Dec. 330.

4 *Van Winkle v. Schoonmaker*, 15 N. J. Eq. 384, 386.

5 *Lee v. Bennett*, 31 Miss. 119, 123; *post*, § 348.

6 *Stroud v. Connelly*, 33 Gratt. 217, 221. Compare *Alsop v. McArthur*, 76 Ill. 20, 25.

7 See *Cooper v. McDonald*, 7 Ch. Div. 233, 236; *Pool v. Blakie*, 53 Ill. 495, 502, 503.

8 See *Clarke*, 79 Pa. St. 376, 377; *ante*, § 345.

9 *Willock v. Noble*, Law R. 7 H. L. 530, 530, 597; *Cutter v. Butler*, 25 N. H. 343, 359; 57 Am. Dec. 330.

§ 348. *Effect of husband's consent to wife's will.*—A husband cannot, by his consent, give his wife any personal capacity to make a will, for the status of married women depends on the law and not on contract;<sup>1</sup> the most his consent can do is to enable her to dispose, by will, of property belonging to him, in his own right,<sup>2</sup> or in her right, as her husband.<sup>3</sup> Therefore, at common law, while a will of personalty made by a married woman, with her husband's consent, served to carry the property to the legatees,<sup>4</sup> since a wife's personalty vests absolutely in her husband by marriage, and he may do with it as he pleases,<sup>5</sup> yet he has no such interest in her realty, and she could not dispose of real estate even by a will made with his consent,<sup>6</sup> this having no effect as against the heir,<sup>7</sup> or even against him as to his life interest.<sup>8</sup> Of course a different rule prevailed if his consent took the form of a power,<sup>9</sup> or of a settlement of property to the wife's equitable separate use.<sup>10</sup> For a husband may, even by his will, empower his wife to dispose of his property by her will, and a will made during coverture under such power is a good execution thereof.<sup>11</sup> So that when a wife makes a will which is valid by virtue of her husband's consent, she makes it simply as his agent;<sup>12</sup> and she must be specially authorized to make the will in question,<sup>13</sup> a general consent not being sufficient,<sup>14</sup> and knowledge on the part of the husband of the contents of the will being necessary.<sup>15</sup> The assent may be given during or after coverture,<sup>16</sup> orally or in writing,<sup>17</sup> and may be

proved directly or indirectly,<sup>18</sup> as, for example, by the fact that the will was in his handwriting;<sup>19</sup> the usual and proper mode is by her assenting to the probate of the will.<sup>20</sup> The assent is generally revocable by the husband, at pleasure, until probate;<sup>21</sup> it is revoked by his death,<sup>22</sup> and he must, therefore, survive her to render the will good.<sup>23</sup> The will must be probated,<sup>24</sup> and the husband should assent to the probate;<sup>25</sup> if he does so, he cannot afterwards revoke his consent.<sup>26</sup> (It is said, even, that he cannot revoke any consent given after his wife's death.<sup>27</sup>) But he may render his assent irrevocable by a contract on valuable consideration,<sup>28</sup> or under seal,<sup>29</sup> and he may by his conduct estop himself from denying his consent.<sup>30</sup> When the will is valid without the husband's consent, by assenting thereto he waives his rights inconsistent with the provisions of the will.<sup>31</sup> Whether a statute which requires the husband's consent to his wife's will renders a will made without such consent invalid, or simply inoperative as to the husband's interest,<sup>32</sup> must depend on the wording of the act itself.<sup>33</sup> Generally, under the statutes, his assent is not necessary for any purpose.<sup>34</sup>

1 St. John, 11 Ves. Jr. 525, 529; Stewart M. & D. § 181.

2 Lee v. Bennett, 31 Miss. 119, 126; Cutter v. Butler, 25 N. H. 343, 356; 57 Am. Dec. 340; Van Winkle v. Schoonmaker, 15 N. J. Eq. 384, 386; Thorndike v. Reynolds, 22 Gratt. 21, 29.

3 Osgood v. Breed, 12 Mass. 525, 532; *infra*, n. 4.

4 Lloyd v. Hodsden, 2 Bro. C. C. 534, 543, 544; Stevens v. Bagwell, 15 Ves. 156; Adams v. Kellogg, Kirby, 155, 196; 1 Am. Dec. 18; Reay, 31 L. J. Prob. 151; 4 Swab. & T. 215, 217; Isaacs, 31 L. J. Prob. 158, 159; Maas v. Sheffield, 1 Rob. 364; 10 Jur. 417, 418; Noble v. Willock, Law R. 8 Ch. 178, 189, 190; S. C. Law R. 7 H. L. 580, 590; Steadman v. Powell, 1 Addis. 58; Fane, 16 Sim. 406; Picquet v. Swan, 4 Mason, 443, 461; George v. Bussing, 15 Mon. B. 538, 563; Osgood v. Breed, 12 Mass. 525, 532; Lee v. Bennett, 31 Miss. 119, 126; Cain v. Bunkley, 35 Miss. 119, 145; Cutter v. Butler, 25 N. H. 343, 354-357; 57 Am. Dec. 330; Sanborn v. Butchelder, 51 N. H. 426, 431; Marston v. Norton, 5 N. H. 205, 210; Van Winkle v. Schoonmaker, 15 N. J. Eq. 384, 386; Bradish v. Gibbs, 3 Johns. Ch. 323, 540; Newlin v. Freeman, 1 Ired. 514, 520; Barnes v. Irwin, 2 Dall. 199, 201; 1 Am. Dec. 278; Sinelie v. Reynolds, 2 Desaus. Eq. 66, 77; West, 3 Rand. 373, 375; Morton v. Onion, 45 Vt. 145, 153.

- 5 Discussed *ante*, §§ 163-183.
- 6 Adams v. Kellogg, Kirby, 195, 196; 1 Am. Dec. 18; Baker v. Chastang, 18 Ala. 417, 423; Lee v. Bennett, 31 Miss. 119, 126; Sanborn v. Batchelder, 57 N. H. 426, 431; Marston v. Norton, 5 N. H. 205, 210; Newlin v. Freeman, 1 Ired. 514, 520.
- 7 Wagner, 2 Ashm. 445, 453.
- 8 This is assumed in cases *supra*, n. 6.
- 9 West, 10 Serg. & R. 445, 447; *ante*, § 342.
- 10 Cutter v. Butler, 25 N. H. 343, 353; 57 Am. Dec. 330; *ante*, § 344.
- 11 Thorndike v. Reynolds, 22 Gratt. 21, 29.
- 12 Consult *ante*, § 342.
- 13 Cutter v. Butler, 25 N. H. 343, 357; 57 Am. Dec. 330; *infra*, n. 14.
- 14 Rex v. Betlesworth, 2 Strange, 891; Willock v. Noble, Law R. 7 H. L. 580, 597; George v. Bussing, 15 Mon. B. 558, 563; Jones v. Brown, 34 N. H. 439, 446; Cutter v. Butler, 25 N. H. 343, 351; 57 Am. Dec. 330; Kurtz v. Saylor, 20 Pa. St. 205, 209.
- 15 Willock v. Noble, Law R. 7 H. L. 580, 590.
- 16 Van Winkle v. Schoonmaker, 15 N. J. Eq. 384, 386.
- 17 Reed v. Blaisdell, 16 N. H. 194, 202; 41 Am. Dec. 722; *supra*, n. 16.
- 18 Van Winkle v. Schoonmaker, 15 N. J. Eq. 384, 386; Cutter v. Butler, 25 N. H. 354, 357; 57 Am. Dec. 330.
- 19 Grimke, 1 Desaus. Eq. 366, 381.
- 20 West, 3 Rand. 373, 375; *infra*, notes 25, 26.
- 21 Adams v. Kellogg, Kirby, 195, 197; 1 Am. Dec. 18; George v. Bussing, 15 Mon. B. 558, 563; Van Winkle v. Schoonmaker, 15 N. J. Eq. 384, 387.
- 22 Noble v. Willock, Law R. 8 Ch. 778, 789, 790.
- 23 Willock v. Noble, Law R. 7 H. L. 580, 591, 597; 1 Redf. Wills, 25.
- 24 Schull v. Murray, 32 Md. 9, 16; *ante*, § 342.
- 25 George v. Bussing, 15 Mon. B. 558, 563; Lee v. Bennett, 31 Miss. 119, 126; West, 3 Rand. 373, 375.
- 26 Lloyd v. Hodsdon, 2 Bro. C. C. 534, 543; Fane, 16 Sim. 406; Maas v. Sheffield, 1 Rob. 364; 10 Jur. 417, 418; Van Winkle v. Schoonmaker, 15 N. J. Eq. 384, 388; Wagner, 2 Ashm. 448, 453.
- 27 Cutter v. Butler, 25 N. H. 343, 357, 358; 57 Am. Dec. 330.
- 28 Lloyd v. Hodsdon, 2 Bro. C. C. 534, 543, 544; Van Winkle v. Schoonmaker, 15 N. J. Eq. 384, 386.
- 29 Fisher v. Kimball, 17 Vt. 323, 328.
- 30 Van Winkle v. Schoonmaker, 15 N. J. Eq. 384, 388.
- 31 George v. Bussing, 15 Mon. B. 558, 563; Beal v. Storm, 26 N. J. Eq. 373, 378; McBride, 81 Pa. St. 303, 306.
- 32 As to this distinction see *ante*, § 347.
- 33 Compare Schley v. McCeney, 36 Md. 267, 273, and Vreeland v. Ryno, 26 N. J. Eq. 160, 162.
- 34 Urquhart v. Oliver, 56 Ga. 344, 346; *ante*, §§ 345, 346.

‡ 349. Mutual wills between husband and wife.—There is nothing to prevent a husband willing his property

to his wife,<sup>1</sup> and if a married woman can make a will at all, there is generally nothing to prevent her making a will in favor of her husband.<sup>2</sup> It has been held that, under a statute providing that the will of a wife should not affect the interest in her property of her husband, she could not make a will to him,<sup>3</sup> and that a general act empowering her to will did not authorize wills to her husband;<sup>4</sup> but as the unity of husband and wife has ceased when the will takes effect, the same reasons which render contracts between husband and wife invalid do not prevail, and this construction of statutes is hardly reasonable;<sup>5</sup> and a wife can will to her husband under a power,<sup>6</sup> or as respects her equitable separate estate.<sup>7</sup> So joint and mutual wills of husband and wife are valid.<sup>8</sup> But either husband<sup>9</sup> or wife<sup>10</sup> may put his wife or her husband to an election to take under the will or under the law; and in many States there are statutes expressly referring to wills between husband and wife.<sup>11</sup> A statute cannot, after the death of one of the parties, rectify a mistake whereby in mutual wills the husband signed the wife's, and the wife the husband's.<sup>12</sup>

1 *Burdeno v. Amperse*, 14 Mich. 90, 93; *ante*, § 50.

2 See *Morse v. Thompson*, 4 Cush. 562, 567; *ante*, § 50.

3 *Morse v. Thompson*, 4 Cush. 562, 565.

4 *Wakefield v. Phelps*, 37 N. H. 295, 305; *ante*, § 50.

5 *Burdeno v. Amperse*, 14 Mich. 90, 93; *Morse v. Thompson*, 4 Cush. 562, 567.

6 *Bradish v. Gibbs*, 3 Johns. Ch. 523, 535; *ante*, § 342.

7 *Burton v. Holly*, 18 Ala. 408, 411, 412; *ante*, § 344.

8 *Wyche v. Clapp*, 43 Tex. 543, 548, 549.

9 See *ante*, §§ 273, 275.

10 See *Huston v. Cone*, 24 Ohio St. 20; *Clarke*, 79 Pa. St. 376.

11 See *Ames*, 33 La. An. 1317, 1329; *ante*, § 50.

12 *Alter*, 67 Pa. St. 341, 345; 5 Am. Rep. 433; *ante*, § 23.

§ 350. *Gifts causa mortis of married women.*—The principles applicable to wills of married women seem



generally applicable to their gifts *causa mortis*.<sup>1</sup> A wife may make a *donatio mortis causa* of her equitable separate estate,<sup>2</sup> or of any of her personalty with her husband's consent,<sup>3</sup> and she may make such a gift to her husband himself.<sup>4</sup> But she cannot, of course, give away what she has previously disposed of.<sup>5</sup>

1 Jones v. Brown, 34 N. H. 439, 446.

2 Kilby v. Godwin, 2 Del. Ch. 61, 71.

3 Jones v. Brown, 34 N. H. 439, 446.

4 Caldwell v. Renfrew, 33 Vt. 213, 219.

5 Lawrence v. Bartlett, 7 Allen, 36, 38.

§ 351. **Revocation of will by married woman.**—The same capacity is required to revoke a will as to execute it,<sup>1</sup> and it is because a married woman cannot revoke a will at common law that marriage itself works a revocation.<sup>2</sup> Any valid will made during coverture revokes all other wills, so far as they are inconsistent with it.<sup>3</sup> If she may make a will she may revoke one.<sup>4</sup>

1 Mosser, 32 Ala. 551, 556.

2 Morton v. Onion, 45 Vt. 145, 153; *post*, § 352.

3 Hawksley v. Barrow, Law R. 1 Pro. & D. 147, 152.

4 Mosser, 32 Ala. 551, 556.

§ 352. **Wills of married women made before marriage.**—A will made before marriage by a woman was at common law revoked by her marriage.<sup>1</sup> This rule has been said to rest on the following grounds: (1) That as she could not make a will during coverture, her antenuptial will ceased on marriage to be ambulatory,<sup>3</sup> which is contrary to the nature of wills.<sup>4</sup> (2) That by marriage her power to dispose of her property was taken away,<sup>5</sup> and her husband's rights attached by operation of law.<sup>6</sup> (3) That marriage worked so great a change in her condition that the law would presume that she had not meant her will to operate in case of her marriage.<sup>7</sup> Whatever the grounds were, there was



no question at common law but that her will was revoked; but whether modern statutes, securing to her her separate property or authorizing her to dispose of her property by will, indirectly repeal this rule is disputed.<sup>8</sup> On the one hand, it is said that by these statutes her will is no longer ambulatory,<sup>9</sup> and her rights to her property are full,<sup>10</sup> and that therefore the reasons for the rule at common law are gone and the rule must go also;<sup>11</sup> that marriage alone does not work a revocation, because it does not do so in the case of a man; and that a will is revoked only by marriage and birth of issue.<sup>12</sup> On the other hand, it is said that it is perfectly consistent with the legislative intent in passing these statutes that antenuptial wills should be governed by the previous rule;<sup>13</sup> and that the rule that a will is not revoked by marriage alone, but only by marriage and birth of issue, is not a reasonable one, and should not be applied to married women unless expressly adopted by statute.<sup>14</sup> In many States the rule that marriage alone revokes any will is adopted by statute,<sup>15</sup> and where this rule was adopted by statute only as to married women, statutes afterwards passed increasing the powers and capacity of married women do not repeal it.<sup>16</sup> The rule at common law applied to cases where the wife survived her husband,<sup>17</sup> but not to wills made under and by virtue of a power.<sup>18</sup>

1 *Forse v. Hembling*, 4 Rep. 60, 61; *Douglas v. Cooper*, 3 Mylne & K. 378, 481; *Hodsden v. Lloyd*, 2 Bro. C. C. 540, 544; 2 Term, 684; *Cotter v. Laver*, 2 P. Wms. 623, 624; *Tuller*, 79 Ill. 99, 101; *Swan v. Hammond*, Mass. S. C. 1884; 19 Cent. L. J. 431, 432; *Noyes v. Southworth*, Mich. S. C. Oct. 1884; 20 N. W. Rep. 891; 19 Cent. L. J. 432; *Garrett v. Dabney*, 27 Miss. 335, 342; *Allen v. Fellows*, N. H. 1884; *Compton v. Pierson*, 28 N. J. Eq. 229, 230, 231; *Brown v. Clark*, 77 N. Y. 369, 473; *Loomis*, 51 Barb. 257; *Wood v. Bullock*, 3 Hawks, 298, 300; *Kurtz v. Saylor*, 20 Pa. St. 205, 209; *Davis*, 1 Tuck. 107; *Morton v. Onion*, 45 Vt. 145, 153; *Carey*, 49 Vt. 236.

2 Discussed *ante*, § 341.

3 *Hodsden v. Lloyd*, 2 Bro. C. C. 540, 544; *Noyes v. Southworth*, 20 N. W. Rep. 891; 19 Cent. L. J. 432; *Tuller*, 79 Ill. 99, 101; *infra*, n. 5.

4 *Tuller*, 79 Ill. 99, 101.

H. & W.—45.

- 5 *Morton v. Onion*, 45 Vt. 145, 153 ; *supra*, n. 3.
- 5 Discussed *ante*, §§ 141-183.
- 7 *Brown v. Clark*, 77 N. Y. 369, 373, 374 ; *Swan v. Hammond*, 19 Cent. L. J. 431, 432. See *Tuller*, 79 Ill. 99, 102.
- 8 See *pro*, *Tuller*, 79 Ill. 99, 101, 103 ; *Noyes v. Southworth*, *supra*, n. 1 ; *Allen v. Fellows*, *supra*, n. 1 ; *Morton v. Onion*, 45 Vt. 145, 153. See *contra*, *Swan v. Hammond*, *supra*, n. 1 ; *Brown v. Clark*, 77 N. Y. 369, 373, 374.
- 9 *Morton v. Onion*, 45 Vt. 145, 153 ; *supra*, n. 3.
- 10 *Tuller*, 79 Ill. 99, 101 ; *ante*, §§ 217-243.
- 11 *Noyes v. Southworth*, *supra*, n. 1 ; cases cited *pro*, *supra*, n. 8.
- 12 *Tuller*, 79 Ill. 99, 103, 105 ; *Tyler*, 19 Ill. 151 ; *supra*, n. 11.
- 13 *Swan v. Hammond*, *supra*, n. 1 ; *Brown v. Clark*, 77 N. Y. 369, 374.
- 14 *Swan v. Hammond*, *supra*, n. 1.
- 15 See 19 Cent. L. J. 432.
- 16 *Brown v. Clark*, 77 N. Y. 369, 373, 374 ; *Loomis*, 51 Barb. 237, 259.
- 17 *Cotter v. Laver*, 2 P. Wms. 623, 624 ; *Garrett v. Dabney*, 27 Miss. 335, 343.
- 18 *Logan v. Bell*, 1 Com. B. 873, 886 ; *Noyes v. Southworth*, 20 N. W. Rep. 591. Compare *Hodsdon v. Lloyd*, 2 Bro. C. C. 540, 544.

§ 353. Republication of married women's wills after dissolution of marriage. — A will made before marriage and revoked by marriage is not revived by the death of the husband, but must be republished.<sup>1</sup> A valid will made during coverture remains valid, and does not have to be republished when the marriage is dissolved.<sup>2</sup> An invalid will made during coverture does not become valid when the husband dies ;<sup>3</sup> the widow's intention to adhere thereto will not suffice ;<sup>4</sup> nothing can give it efficacy save a republication.<sup>5</sup> A republication means a re-execution, with all the formalities required by law.<sup>6</sup> A codicil duly executed is a republication.<sup>7</sup> The delivery by a widow of a will executed during coverture has been held to make a valid will.<sup>8</sup> The death of the husband revokes a will made with his consent at common law.<sup>9</sup>

1 *Cotter v. Laver*, 2 P. Wms. 623, 624 ; *Garrett v. Dabney*, 27 Miss. 335, 343 ; *ante*, § 352. *Contra*, *Wood v. Bullock*, 3 Hawks, 298, 300.

2 *Thorndike v. Reynolds*, 22 Gratt. 21, 32.

3 *Osgood v. Breed*, 12 Mass. 525, 530.

4 Willock v. Noble, Law R. 7 H. L. 580, 591.

5 Osgood v. Breed, 12 Mass. 525, 530.

6 Willock v. Noble, Law R. 7 H. L. 580, 597.

7 Kurtz v. Saylor, 20 Pa. St. 205, 209.

8 Miller v. Brown, 2 Hagg. Ecc. 209.

9 Noble v. Willock, Law R. 8 Ch. 778, 789, 790 ; *ante*, § 348.

§ 354. **Conflict of laws as to wills.**—Wills of real estate are governed by the law of the State where the lands lie, wills of personalty by the law of the testator's domicile.<sup>1</sup> The validity and effect of the will of a married woman depends on the law which exists at the time of her death,<sup>2</sup> though its validity had been held to depend on the law existing at the time of its execution.<sup>3</sup>

1 1 Jarman Wills, ch. 1 ; *ante*, §§ 30-36.

2 Wakefield v. Phelps, 37 N. H. 295, 306 ; *ante*, § 36.

3 Kurtz v. Saylor, 20 Pa. St. 205, 209 ; *ante*, § 36.

## CHAPTER XXI.

### CONTRACTS OF MARRIED WOMEN.

ART. I. THE GENERAL PRINCIPLES, §§ 355-368.

II. EFFECT OF STATUTES, GENERALLY, §§ 369-378.

III. SPECIAL KINDS OF CONTRACTS, §§ 379-393.

#### ARTICLE I.—THE GENERAL PRINCIPLES.

- § 355. The word "contract" defined and explained.
- § 356. Law of contracts as affected by coverture.
- § 357. Contracts of married women at common law, generally.
- § 358. Contracts of married women at common law, exceptions.
- § 359. Contracts of married women in equity.
- § 360. Contracts charging equitable separate property.
- § 361. Contracts of married women under statutes.
- § 362. Contracts charging statutory separate property.
- § 363. Contracts of married women as agents.
- § 364. Contracts of married women through agents.
- § 365. Contracts of married women made before marriage.
- § 366. Contracts of married women confirmed after coverture.
- § 367. Contracts between husband and wife.
- § 368. Invalid contracts, whether void or voidable.

§ 355. The word "contract" defined and explained.—The word "contract," as used in this chapter, must be taken to cover any transaction between consenting parties. It includes executory contracts, mere promises, and executed contracts, such as deeds, express and implied agreements, and contracts *in personam*, binding personally, and contracts *in rem*, binding on property. In this chapter the general rules relating to all contracts of married women, and especially executory contracts, are discussed; in the next, deeds of married women are separately considered.

§ 356. Law of contracts as affected by law of married women.—The law of contracts requires that there shall

be two parties at least to every contract,<sup>1</sup> and that the parties shall be capable of giving their consent.<sup>2</sup> In the first of these rules, since at common law husband and wife are one person,<sup>3</sup> lies the main reason for the invalidity of contracts between husband and wife;<sup>4</sup> in the second, since a wife is said at common law to have no will of her own, but to be under the power and control of the husband,<sup>5</sup> lies the reason for the invalidity of all contracts of married women.<sup>6</sup> As the unity of husband and wife has been gradually encroached upon in equity and by statute, and as the disabilities of married women have been gradually directly and indirectly removed, the number of contracts which a married woman can make has been gradually growing. But so blind has been legislation, and so inconsistent have been decisions, that the present state of the law of contracts of married women is most confused.

1 *Scarborough v. Watkins*, 9 Mon. B. 540, 545; 50 Am. Dec. 528.

2 *Anson Contracts*, p. 96.

3 Discussed *ante*, §§ 39, *et seq.*

4 *White v. Wager*, 25 N. Y. 323, 329; *ante*, §§ 40-46.

5 *Burleigh v. Coffin*, 22 N. H. 118, 124; 52 Am. Dec. 236; *ante*, § 331; *post*, § 356.

6 *Martin v. Dwelly*, 6 Wend. 9, 12, 13; 21 Am. Dec. 245; *post*, § 356.

§ 357. **Contracts of married women at common law, generally.**—At common law, generally, all contracts, agreements, covenants, promises,<sup>1</sup> and representations<sup>2</sup> of married women were absolutely null and void,<sup>3</sup> at law and in equity.<sup>4</sup> The grounds of their invalidity were that a married woman had no legal existence, being merged in her husband;<sup>5</sup> that she had no separate existence;<sup>6</sup> and that she had no consenting capacity, as she was under the power and control of her husband, and his wish was her law.<sup>7</sup> The common-law rule, although for the greater part done away with by equity and statutes, still so far exists that any capacity

of a married woman to contract is regarded as exceptional, and the grounds thereof must be alleged and proved by one setting it up.<sup>8</sup> Married women are still *prima facie* unable to contract at all.<sup>9</sup>

1 Norris v. Lantz, 18 Md. 260, 269; Martin v. Dwelly, 6 Wend. 9, 12; 21 Am. Dec. 245. See Butler v. Buckingham, 5 Day, 492, 504; 5 Am. Dec. 174; Pulterson v. Lawrence, 90 Ill. 174, 179; Rodemeyer v. Rodman, 5 Iowa, 426, 427; Haggerty v. Corri, 5 La. An. 433; Pond v. Carpenter, 12 Minn. 430, 432; Davis v. Fry, 15 Miss. 64, 67; Waul v. Kirkman, 25 Miss. 609, 619; Davis v. Smith, 75 Mo. 219, 225; Sprover v. Nickell, 55 Mo. 264, 267; Danner v. Berthold, 11 Mo. App. 351, 358, 359; Franklin v. Beatty, 14 N. J. Eq. 462, 466; Kelso v. Tabor, 52 Barb. 125, 124; Groene v. Frondhof, 1 Disn. 504, 505; Glidden v. Strupler, 52 Pa. St. 400, 404; Farrar v. Bessey, 24 Vt. 89, 93.

2 Keen v. Coleman, 39 Pa. St. 299, 302; Wilson v. Fuller, 60 How. Pr. 480, 481. No estoppel: Danner v. Berthold, 11 Mo. App. 351, 358, 359; *post*, §§ 363, 415.

3 Neef v. Redmon, 76 Mo. 195, 197; *post*, § 363.

4 Pond v. Carpenter, 12 Minn. 430, 432; *post*, § 350.

5 Rodemeyer v. Rodman, 5 Iowa, 426, 427; *ante*, §§ 39, 331.

6 Kelso v. Tabor, 52 Barb. 125, 123; *ante*, § 39.

7 Sandford v. McLean, 3 Paige, 117, 122; 23 Am. Dec. 773; Martin v. Dwelly, 6 Wend. 9, 12; 21 Am. Dec. 245.

8 Hinkson v. Williams, 41 N. J. Eq. 35, 37. S. P., Stillwell v. Adams, 29 Ark. 346; Way v. Peck, 47 Conn. 23; Tracy v. Keith, 11 Allen, 214, 215; West v. Laraway, 23 Mich. 464, 467; Pollen v. James, 45 Miss. 129, 133; Lewis v. Perkins, 36 N. J. L. 133; Nash v. Mitchell, 71 N. Y. 199.

9 Rodemeyer v. Rodman, 5 Iowa, 426, 428.

§ 358. Contracts of married women at common law, exceptions.—Under certain circumstances at common law married women had the capacities of unmarried women,<sup>1</sup> and could therefore contract as *femmes sole*.<sup>2</sup> This was the case when the husband was an alien residing abroad,<sup>3</sup> or when he had been banished,<sup>4</sup> or had abjured the realm,<sup>5</sup> or was civilly dead.<sup>6</sup> In the United States a permanent departure from the State, and renunciation of his married rights by a husband, invests his wife with the capacities of a *femme sole*,<sup>7</sup> though whether under such circumstances she can make a valid deed seems to be disputed.<sup>8</sup> Though in Texas mere separation if permanent is sufficient to produce this result,<sup>9</sup> the true rule seems to be that neither de-

parture from the State alone,<sup>10</sup> nor separation alone,<sup>11</sup> is sufficient; but the husband must have both renounced his marital rights and put himself permanently beyond the process of the courts of the State.<sup>12</sup> The effect of a divorce *a mensa et thoro* is different in different States.<sup>13</sup> A married woman may also, as agent,<sup>14</sup> under a power,<sup>15</sup> and in representative capacities,<sup>16</sup> contract as a *femme sole*.

1 Discussed *ante*, §§ 332-336.

2 Worthington v. Cooke, 52 Md. 297, 307; Bean v. Morgan, 4 McCord, 148.

3 Gallagher v. Delargy, 57 Mo. 29, 37.

4 Rhea v. Renner, 1 Peters, 105, 107; Stewart M. & D. § 177.

5 Musick v. Dobson, 76 Mo. 624, 628; 43 Am. Rep. 780.

6 Worthington v. Cooke, 52 Md. 297, 306; *ante*, § 334.

7 Musick v. Dobson, 76 Mo. 624, 628; 43 Am. Rep. 780; Danner v. Berthold, 11 Mo. App. 351, 355; Stewart M. & D. § 177; *ante*, § 332.

8 *Pro*, Gallagher v. Delargy, 57 Mo. 29, 37; Danner v. Berthold, 11 Mo. App. 351, 355. *Contra*, Rhea v. Renner, 1 Peters, 105, 107; Beckman v. Stanley, 8 Nev. 257, 261.

9 Davis v. Saladee, 57 Tex. 326, 327.

10 Rogers v. Phillips, 8 Ark. 366; 47 Am. Dec. 727.

11 High v. Worley, 33 Ala. 196; Chouteau v. Merry, 3 Mo. 254; Harris v. Taylor, 3 Sneed, 536, 538.

12 Danner v. Berthold, 11 Mo. App. 351, 355.

13 Discussed *ante*, § 333; Stewart M. & D. § 449.

14 Discussed *ante*, §§ 89, 98; *post*, § 363.

15 Martin v. Dwelly, 6 Wend. 9, 12; 21 Am. Dec. 245; *post*, § 363.

16 *Post*, §§ 482-487.

§ 359. **Contracts of married women in equity.**—Independently of statute, a married woman's personal contracts are no more binding in equity than they are at law;<sup>1</sup> as to her person and her general property her contracts are absolutely void,<sup>2</sup> so that even her deed, if not properly executed at law, cannot be reformed, corrected, or enforced in equity.<sup>3</sup> But equity recognizes the separate property and existence of married women, and, in most States, a wife is with respect to such property treated as a *femme sole*,<sup>4</sup> and her contracts relating to the latter are enforced in a proceeding *in rem*.<sup>5</sup> It

has been said that equity has an additional jurisdiction to prevent frauds by married women;<sup>6</sup> and a mortgage which the mortgagor, a married woman, had no power to make, has been sustained in equity, when it was given to secure the purchase money of property which the woman occupied and enjoyed, in order to prevent injustice;<sup>7</sup> and so has a married woman's deed, she having received the purchase money, the deed having been executed after she had obtained a divorce which was supposed valid, while in fact void;<sup>8</sup> and equity has even enjoined her from recovering property which had passed out of her possession by an invalid assignment, when in good conscience she should not recover it;<sup>9</sup> but all these cases are exceptional, a married woman not being estopped generally in equity even,<sup>10</sup> and the rule as above stated is well settled.<sup>11</sup> Equity will not compel a married woman to join in her husband's deed according to his covenant.<sup>12</sup> But husband and wife are not one person in equity, and can to some extent contract together.<sup>13</sup>

1 Vaughan v. Vanderstegen, 2 Drew, 165, 180; Miller v. Newton, 23 Cal. 554, 564; Butler v. Buckingham, 5 Day, 432, 501; 5 Am. Dec. 174; Hodges v. Price, 18 Fla. 342, 314; Patterson v. Lawrence, 90 Ill. 174, 179; 32 Am. Dec. 22; Rodemeyer v. Rodman, 5 Iowa, 426, 427; Norris v. Lantz, 18 Md. 260, 269; Jennie v. Marble, 37 Mich. 319, 323; Loomis v. Brush, 36 Mich. 40, 46; Davis v. Smith, 75 Mo. 219, 224, 225; Boatmen v. Collins, 75 Mo. 280, 281; White v. Wager, 25 N. Y. 328, 334.

2 Rodemeyer v. Rodman, 5 Iowa, 426, 427; Davis v. Smith, 75 Mo. 219, 224, 225.

3 Loomis v. Brush, 36 Mich. 40, 46; *post*, § 368.

4 Rodemeyer v. Rodman, 5 Iowa, 426, 427; *ante*, § 203.

5 Pawley v. Vogel, 42 Mo. 291, 302; *ante*, §§ 206-208.

6 Cahill v. Martin, 7 Irish Law Rep. 361, 379.

7 Glass v. Warwick, 40 Pa. St. 140, 145. See *contra*, Riley v. Pierce, 50 Ala. 93.

8 Reis v. Lawrence, 63 Cal. 129, 135; 36 Am. Rep. 762.

9 Patterson v. Lawrence, 90 Ill. 174, 179; 32 Am. Dec. 22; Pilcher v. Smith, 2 Head, 208, 211.

10 See Wood v. Terry, 30 Ark. 385, 393; Oglesby v. Pasco, 79 Ill. 164, 170; Glidden v. Strupler, 52 Pa. St. 400, 401; *post*, §§ 409-420.

11 Danner v. Berthold, 11 Mo. App. 351, 358.

12 Young v. Paul, 10 N. J. Eq. 401, 409-411.

13 Morrison v. Thistle, 67 Mo. 576, 601; *ante*, § 42; *post*, § 367.



§ 360. **Contracts charging equitable separate property.**—The law of charges of equitable separate property in equity has already been discussed.<sup>1</sup> Contracts which are valid as such charges are enforced in a proceeding *in rem*,<sup>2</sup> and are not binding on the married woman personally.<sup>3</sup>

1 *Ante*, §§ 207, 208.

2 *Vaughan v. Vanderstegen*, 2 Drew. 165, 184; *Worthington v. Cooke*, 52 Md. 297, 308; *ante*, § 206.

3 *Pawley v. Vogel*, 42 Mo. 291, 302; *supra*, n. 2.

§ 361. **Contracts of married women under statutes.**—The present capacity of married women to contract depends largely on statutes; and the effect of statutes, general and special, on the common-law rules forms a most important subject, which will be separately discussed.<sup>1</sup>

1 *Post*, §§ 369-377.

§ 362. **Contracts charging statutory separate property.**—The law of contracts relating to statutory separate property has already been discussed.<sup>1</sup> The statutory separate property is sometimes liable on such contracts in equity,<sup>2</sup> and sometimes at law,<sup>3</sup> but this liability of this property is quite distinct from a general personal liability.<sup>4</sup>

1 *Ante*, §§ 237-239.

2 *Stockton v. Farley*, 10 W. Va. 171, 175; 27 Am. Rep. 566; *ante*, §§ 239, 242.

3 *Cookson v. Toole*, 59 Ill. 515, 519; *ante*, §§ 239, 242.

4 *Doyle v. Orr*, 51 Miss. 229, 232; *ante*, §§ 237, 239.

§ 363. **Contracts of married women as agents.**—In spite of her disabilities, a married woman can be an agent.<sup>1</sup> It is very common to find her acting as her husband's agent,<sup>2</sup> and he is liable on all contracts made by her with his consent or authority.<sup>3</sup> But although she can bind her principal, whether she can bind herself de-

pend on whether she can herself make the contract in question.<sup>4</sup> So she can execute powers enabling her to contract, convey, etc.<sup>5</sup>

1 Ewell's Evans on Agency, p. 13; *post*, § 484.

2 *Savage v. Davis*, 18 Wis. 608, 613; *ante*, §§ 89-98.

3 *Morgan v. Andriot*, 2 Hilt. 431, 432; *Mayse v. Biggs*, 3 Head, 36, 38.

4 See *Tucker v. Cocke*, 32 Miss. 184, 189.

5 *Vaughan v. Vanderstegen*, 2 Drew. 165, 185; *Coryell v. Danton*, 7 Pa. St. 550, 552; 49 Am. Dec. 489; *ante*, §§ 203, 342.

§ 364. **Contracts of married women through agents.**—A married woman had at common law no legal existence, and could not therefore have any legal representative,<sup>1</sup> or rather her legal existence was merged in that of her husband, and he was for all things her agent in law;<sup>2</sup> so her antenuptial appointment of agent was revoked by her marriage.<sup>3</sup> Her capacity to contract through agent is now co-extensive with her capacity to contract directly: thus, she cannot make a contract through an agent which she could not make herself,<sup>4</sup> as a contract with respect to her property not separate;<sup>5</sup> and she can make through an agent such contracts as she could make herself,<sup>6</sup> as contracts charging her separate estate,<sup>7</sup> or in the course of her business;<sup>8</sup> but she cannot execute a mere power through an agent,<sup>9</sup> as a release of dower,<sup>10</sup> or a conveyance of her property,<sup>11</sup> under a statute requiring certain formalities; and in executing such deeds the blanks must be filled up before her acknowledgment, as she cannot appoint an agent to do this afterwards.<sup>12</sup> Her capacity to act through agent must, however, be distinguished from her capacity to contract for compensation with her agent, which contract must be determined by rules elsewhere discussed.<sup>13</sup> The position of her husband as her agent,<sup>14</sup> her appointment of attorneys at law,<sup>15</sup> and her powers of attorney,<sup>16</sup> are elsewhere discussed.

- 1 See *Kelso v. Tabor*, 52 Barb. 125, 128; *ante*, §§ 333, 357.
- 2 *Rodemeyer v. Rodman*, 5 Iowa, 426, 427; *ante*, §§ 82, 84.
- 3 *Montague v. Carneal*, 1 Marsh. A. K. 351, 352.
- 4 *Wilbur v. Abernethy*, 54 Ala. 644, 646; *ante*, § 84, n. 14.
- 5 *Hall v. Callahan*, 86 Mo. 316, 324.
- 6 *Vail v. Meyer*, 71 Ind. 159, 165; *Bickford v. Dare*, 58 N. H. 185 186; cases *ante*, §§ 84-88.
- 7 *Vail v. Meyer*, 71 Ind. 159, 165; *Morrison v. Thistle*, 67 Mo. 596, 600.
- 8 *Paine v. Farr*, 118 Mass. 74, 76.
- 9 *Holland v. Moon*, 39 Ark. 120, 125; *post*, § 406.
- 10 *Dawson v. Shirley*, 6 Blackf. 531, 532; *ante*, § 271.
- 11 *Holladay v. Daily*, 19 Wall. 606, 609; *post*, §
- 12 *Hord v. Taubman*, 79 Mo. 101, 104.
- 13 See *Tucker v. Cocke*, 32 Miss. 184, 189; *ante*, § 87.
- 14 *Ante*, §§ 84-88.
- 15 *Post*, §§ 462, 463.
- 16 *Post*, § 406.

§ 365. Effect of marriage on antenuptial contracts.— Marriage suspends the remedies against a married woman on her antenuptial contracts,<sup>1</sup> or rather it makes her husband liable for them with her,<sup>2</sup> and a judgment recovered on such a contract against husband and wife can be satisfied out of the property of either of them.<sup>3</sup> Her husband's liability ceases on her death or on divorce,<sup>4</sup> while on divorce or his death her full liability revives.<sup>5</sup> And the same is said to be the effect of any event which gives her the powers of a *femme sole*.<sup>6</sup> And her promise during coverture to pay an antenuptial debt does not take such debt out of the Statute of Limitations,<sup>7</sup> being itself void.<sup>8</sup> In many States the husband's liability for his wife's antenuptial debts has been destroyed by statute, and her full liability on the same has been declared.<sup>9</sup>

- 1 *Clarke v. Windham*, 12 Ala. 778, 801; *ante*, § 66.
- 2 Discussed *ante*, § 66.
- 3 *Hall v. White*, 27 Conn. 488, 494; *Peace v. Splerin*, 2 Desaus. Eq. 460, 470. *Contra*, *Hapgood v. Harris*, 10 Ala. 291, 292.
- 4 *Cureton v. Moore*, 7 Jones Eq. 204, 206; *ante*, § 66.
- 5 *Hall v. White*, 27 Conn. 488, 494.

6 *Clarke v. Windham*, 12 Ala. 798, 801.

7 *Farrar v. Bessey*, 24 Vt. 89, 93.

8 *Parker v. Cowen*, 1 Heisk. 513, 520; *post*, § 368.

9 See cases cited *ante*, § 66.

§ 366. **Confirmation of contracts after dissolution of marriage.**—The mere fact that a wife survives her husband does not give any efficacy to her contracts made during coverture,<sup>1</sup> though it has been held that a contract enforceable against her during coverture only, in equity, could be enforced at law against her after coverture;<sup>2</sup> but her liability on her antenuptial contracts revives.<sup>3</sup> As her contracts made during coverture are void and not voidable,<sup>4</sup> they cannot be ratified,<sup>5</sup> and therefore, according to the better view, her mere promise to perform them made after coverture (after divorce<sup>6</sup> or death of husband<sup>7</sup>) is without consideration and void;<sup>8</sup> but in some States the moral consideration is deemed sufficient to support and render valid such a promise,<sup>9</sup> and in others the courts have expressly declined to decide this point.<sup>10</sup> But whatever be the opinion as to the effect of an express promise, there is no doubt but that a mere recognition of the contract gives it no new validity.<sup>11</sup> A contract enforceable in equity is, however, ample consideration for an express promise;<sup>12</sup> so is the surrender of a note void as to her, but binding on others;<sup>13</sup> so is a note given for an antenuptial debt.<sup>14</sup> A married woman cannot set up her invalid deed by parol,<sup>15</sup> but she can confirm her assignments and deeds by reacknowledgment and recording,<sup>16</sup> by estoppel, etc.,<sup>17</sup> and in Iowa may ratify her deed of the homestead as if she had never been married.<sup>18</sup> So by bringing suit on an invalid contract she confirms it by matter of record.<sup>19</sup>

1 *Ross v. Singleton*, 1 Del. Ch. 149; 12 Am. Dec. 86; *Caudy v. Coppock*, 85 Ind. 594, 597.

2 *Schaeffer v. Ivory*, 7 Mo. App. 461, 462; *King v. Mittalberger*, 50 Mo. 182, 185.

3 *Clarke v. Windham*, 2 Jones Eq. 204, 206; *ante*, § 365.

- 4 *Huntley v. Whitner*, 77 N. C. 392, 393; *post*, § 368.
- 5 *Robinson*, 11 Bush, 174, 179; *Parker v. Cowan*, 1 Heisk. 518, 523.
- 6 *Putnam v. Tennyson*, 50 Ind. 453, 453; *Musick v. Dodson*, 76 Mo. 624, 625; 43 Am. Rep. 780.
- 7 *Heyward v. Barker*, 52 Vt. 429, 432; 36 Am. Rep. 762.
- 8 *Musick v. Dodson*, 76 Mo. 624, 625; 43 Am. Rep. 780; *Heyward v. Barker*, 52 Vt. 429, 432; 36 Am. Rep. 762. S. P., *Wemhall v. Adney*, 3 Bos. & P. 247, 252; *Eastwood v. Kenyon*, 11 Ad. & E. 457; *Meyer v. Hawarth*, 8 Ad. & E. 467; *Lloyd v. Lee*, 1 Strange, 94; 2 Saund. 137 *d*; *Watson v. Dunlap*, 2 Cranch C. C. 14; *Hetherington v. Hixon*, 46 Ala. 297, 298; *Carter v. Wann*, 45 Ala. 343; *Valice v. Wells*, 6 Ala. 757; *Cook v. Bradley*, 7 Conn. 57, 61; 18 Am. Dec. 79; *Waters v. Bean*, 15 Ga. 358, 360; *Howard v. Simpkins*, 70 Ga. 322, 326; *Thomas v. Passage*, 54 Ind. 106, 112; *Putnam v. Tennyson*, 50 Ind. 456, 458; *Maher v. Martin*, 43 Ind. 314; *Robinson*, 11 Bush, 174, 179; *Mills v. Wyman*, 3 Pick. 207; *Loomis v. Brush*, 36 Mich. 40, 47; *Keenerly v. Martin*, 8 Mo. 698, 700; *Price v. Hart*, 29 Mo. 171, 172; *Watkins v. Halstead*, 2 Sand. 311, 315; *Smith v. Allen*, 1 Laus. 101; *Groene v. Frondhof*, 1 Disn. 504; *Foster v. Wilcox*, 10 R. I. 444; 14 Am. Rep. 698; *Shepard v. Rhodes*, 7 R. I. 470; *McGeer v. Furguson*, Riley, 159; *Ferrell v. Scott*, 2 Spear, 344; 42 Am. Dec. 371; 1 Story Cont. § 465; 1 Chit. Cont. 55, 56; 1 Bish. M. W. § 39; 1 Par. Cont. 432, 435.
- 9 *Hemphill v. McClimans*, 24 Pa. St. 367, 371. See *Lee v. Muggeridge*, 5 Taunt. 56; *Atkins v. Banwell*, 2 East, 596; *Hawkes v. Saunders*, 1 Cowp. 290; *Gibbs v. Merrill*, 3 Taunt. 311; *Seaman v. Price*, 2 Bing. 439; *Stewart v. Eden*, 2 Cuines, 150; *Viser v. Bertrand*, 14 Ark. 273; *Lapiter v. Delogny*, 33 La. An. 659, 666; *Franklin v. Beatty*, 27 Miss. 347.
- 10 *Spitz v. Fourth*, 8 Lea, 641, 643. See *Caudy v. Coppock*, 85 Ind. 584, 597; *Hubbard v. Bugbee*, 55 Vt. 506, 509.
- 11 *Caudy v. Coppock*, 85 Ind. 594, 597.
- 12 *Cleland v. Low*, 32 Ga. 458, 463; *Hubbard v. Bugbee*, 55 Vt. 506, 509.
- 13 *Spitz v. Fourth*, 8 Lea, 641, 643.
- 14 *Parker v. Cowan*, 1 Heisk. 518, 520.
- 15 *Price v. Hart*, 29 Mo. 171, 172.
- 16 *Riggs v. Boylan*, 4 Biss. 445, 446.
- 17 See *ante*, § 276; *post*, §§ 402-404.
- 18 *Spafford v. Warren*, 47 Iowa, 47, 51.
- 19 *Walker v. Owen*, 79 Mo. 563, 571.

§ 367. **Contracts between husband and wife.**—There was, at common law, a double reason for the invalidity of contracts between husband and wife—an incapacity of the husband as well as of the wife, since they were one. This double incapacity did not exist in equity. It is much disputed whether it is removed by statutes which refer only to the disabilities of married women. The whole subject has already been treated fully.<sup>1</sup>

<sup>1</sup> *Ante*, §§ 40-46.

H. & W. — 46.

§ 368. Invalid contracts of married women void, not voidable.—The invalid contracts of a married woman are void and not voidable,<sup>1</sup> thus differing from the contracts of an infant ;<sup>2</sup> and they are equally void though the wife survives her husband,<sup>3</sup> and, according to the prevailing view, promises to perform them ;<sup>4</sup> and they are also equally void in the hands of *bona fide* assignees for value, without notice.<sup>5</sup> For, being void, they are incapable of ratification by party<sup>6</sup> or by legislature.<sup>7</sup> A subsequent promise by her to perform her invalid contract is without consideration,<sup>8</sup> and her promise during coverture to pay an antenuptial debt of hers does not affect the running of the Statute of Limitations.<sup>9</sup> A mortgage to secure her invalid note is void,<sup>10</sup> and so is a judgment obtained on it ;<sup>11</sup> but the sureties on her void bond<sup>12</sup> or note<sup>13</sup> are bound, and so are her co-contractors.<sup>14</sup> Her invalid deed is mere waste paper ;<sup>15</sup> if not executed according to the statute, it cannot be treated in equity as an agreement to give a deed ;<sup>16</sup> equity will not rectify, reform, or enforce it,<sup>17</sup> or compel her husband to join to make it good ;<sup>18</sup> such a deed, if recorded, is no notice ;<sup>19</sup> and a subsequent deed of the same property to a different party, if properly executed, gives a good title.<sup>20</sup> Whether she can recover property which has passed out of her possession by an invalid conveyance without restoring the purchase money is disputed ;<sup>21</sup> she could at common law,<sup>22</sup> for the purchase money went to her husband ;<sup>23</sup> and it is the general rule that she cannot be estopped by her invalid contracts ;<sup>24</sup> but there are cases which hold that she must not only pay back the purchase money,<sup>25</sup> but also allow for improvements made meanwhile, and put the party in *statu quo*.<sup>26</sup> Her disability is said to be for her protection and not for her ruin,<sup>27</sup> and, therefore, when she has performed her part of a contract she can

sue upon it,<sup>28</sup> the other party cannot set up its invalidity, for this would be a fraud.<sup>29</sup> Some courts have objected to married women's contracts being called void.<sup>30</sup>

1 Norris v. Lantz, 18 Md. 260, 269; Bagby v. Emberson, 79 Mo. 135, 140; Huntley v. Whitner, 77 N. C. 392, 393; McDaniel v. Anderson, 19 S. C. 211, 217; *ante*, § 357; cases cited *infra*.

2 Robinson, 11 Bush, 174, 179; Neef v. Redmon, 76 Mo. 195, 197; Huntley v. Whitner, 77 N. C. 392, 393.

3 Ross v. Singleton, 1 Del. Ch. 149; 12 Am. Dec. 86; *post*, § 366.

4 Groene v. Frondhof, 1 Disn. 504; *ante*, § 366.

5 Johnson v. Sutherland, 39 Mich. 579, 580.

6 Robinson, 11 Bush, 174, 179; *post*, § 366.

7 Loomis v. Brush, 36 Mich. 40, 47. Discussed *ante*, § 23.

8 Musick v. Dodson, 76 Mo. 624, 625; 43 Am. Rep. 780; *post*, § 366.

9 Farrar v. Bessey, 24 Vt. 89, 93.

10 Hodges v. Price, 18 Fla. 342, 345; Sperry v. Dickinson, 82 Ind. 132, 135.

11 Doyle v. Kelly, 75 Ill. 574; Magruder v. Buck, 56 Miss. 314, 315; Corrigan v. Bell, 73 Mo. 53, 57; Long, 14 N. J. Eq. 462, 466.

12 Coverdale v. Alexander, 82 Ind. 503, 506.

13 Spitz v. Fourth, 8 Lea, 641, 643.

14 Robinson, 11 Bush, 174, 179, 180.

15 Cross v. Everts, 28 Tex. 523, 531; *post*, DEEDS, §§ 397-408.

16 Carr v. Williams, 10 Ohio, 305, 310; 36 Am. Dec. 87; *post*, § 407.

17 Shroyer v. Nickell, 55 Mo. 264, 267; *post*, § 403.

18 Stevens v. Parrish, 29 Ind. 260, 263.

19 Loomis v. Brush, 36 Mich. 40, 47.

20 Johns v. Reardon, 11 Md. 465, 469.

21 See *post*, ESTOPPEL OF MARRIED WOMEN, §§ 409-420.

22 Wood v. Terry, 30 Ark. 385, 393; Glidden v. Strupler, 52 Pa. St. 400, 404.

23 Discussed *ante*, §§ 136, 163-183.

24 Wood v. Terry, 30 Ark. 385, 393; Oglesby v. Pasco, 79 Ill. 164, 170; Wilson v. Fuller, 60 How. Pr. 480, 481; Keen v. Coleman, 39 Pa. St. 299, 302; *post* § 415.

25 Pilcher v. Smith, 2 Head. 208, 211.

26 Shroyer v. Nickell, 55 Mo. 264, 269; Danner v. Berthold, 11 Mo. App. 357, 363.

27 Neef v. Redmon, 76 Mo. 195, 198.

28 Abshire v. Mather, 27 Ind. 381, 382; Walker v. Owen, 79 Mo. 563, 571; Neef v. Redmon, 76 Mo. 195, 197; Palmer v. Davis, 28 N. Y. 242, 248.

29 Abshire v. Mather, 27 Ind. 381, 382.

30 Hooton v. Ransom, 6 Mo. App. 19, 20; Hubbard v. Bugbee, 55 Vt. 506, 508.

## ARTICLE II.—THE STATUTES CONSTRUED—THEIR EFFECT.

- § 369. General statutes not referring to married women.
- § 370. Married women's separate property acts, generally.
- § 371. Married women's separate property acts—Contracts in equity.
- § 372. Married women's separate property acts—Contracts by implication.
- § 373. Married women's separate property acts—Contracts under express powers.
- § 374. Statutes expressly authorizing or prohibiting certain contracts.
- § 375. Statutes expressly authorizing all contracts.
- § 376. Statutes requiring formalities.
- § 377. Local and extra territorial effect.
- § 378. Prospective and retrospective effect.
- § 378 a. The statutes in the different States.

### § 369. Effect of general statutes not mentioning married women.

*Rule. General statutes relating to contracts but not expressly referring to married women, do not affect the validity of married women's contracts, but apply to these only so far as they are valid under other statutes.*

To illustrate: A statute providing that all deeds "shall be valid between the parties though not recorded," would not render the deed of a married woman valid;<sup>1</sup> a statute providing for the giving of replevin bonds does not enable a married woman plaintiff to give such a bond;<sup>2</sup> a statute relating to auction bids would not make the bid of a married woman valid;<sup>3</sup> general insolvent laws have been held inapplicable to married women.<sup>4</sup> A statute requiring the officer to certify that the party executing a deed "was known to me," does not apply to married women's deed executed under another special act not requiring this;<sup>5</sup> nor does a statute relating to the recording of deeds necessarily apply to married women's deeds.<sup>6</sup> But



under the national bank acts which do not mention married women, these are liable for assessment on their stock,<sup>7</sup> and under statutes defining the liabilities of purchasers at mortgage sales without referring to married women, these have been held bound,<sup>8</sup> because other statutes had empowered them to hold stock and purchase property separately from their husbands. So where a married woman may sue as if sole, her attorney may under a general law obtain a lien for his fees;<sup>9</sup> and her valid mortgage may be foreclosed under a general law.<sup>10</sup> And when a married woman may contract, statutes like the statute of frauds apply to her contracts.<sup>11</sup> The rule that general acts do not apply to persons not *sui juris* is familiar,<sup>12</sup> and has often been applied to statutes relating to wills.<sup>13</sup>

1 See *ante*, § 13.

2 See *Ward v. Whitney*, 12 Phila. 246.

3 See *De Hay v. Dennis*, 14 Rich. Eq. 27, 29.

4 *Relief v. Schmidt*, 55 Md. 97, 98.

5 *Bell v. Lyle*, 10 Lea, 44, 45.

6 *Applegate v. Tracy*, 9 Dana, 215, 224.

7 *Anderson v. Line*, 14 Fed. Rep. 405, 406; *The Reciprocity Bk.* 22 N. Y. 9, 15.

8 *Fowler v. Jacob*, Md. Ct. App. Oct. 1883; Md. Law Rec. Oct. 4, 1884.

9 *Putnam v. Tennyson*, 50 Ind. 456, 458.

10 *Hartman v. Ogborn*, 54 Pa. St. 120, 123.

11 She must not only have the capacity to contract, but the contract must be one which would bind her if unmarried: See *Hetherington v. Hixon*, 46 Ala. 297, 298; *Sawyer v. Fernald*, 59 Me. 500, 502; *De Vries v. Conklin*, 22 Mich. 255, 253, 250; *Bayler v. Com.* 40 Pa. St. 37, 44.

12 See *ante*, §§ 13, 369.

13 *Baker v. Chastang*, 13 Ala. 417, 423; *Adams v. Kellogg*, Kirby, 195, 196; 1 Am. Dec. 15; *Reese v. Cochran*, 10 Ind. 135, 197; *Osgood v. Breed*, 12 Mass. 525, 530; *Marston v. Norton*, 5 N. H. 205, 210; *Cutter v. Butler*, 25 N. H. 343, 352; 57 Am. Dec. 330; *Wakefield v. Phelps*, 37 N. H. 295, 300; *ante*, §§ 13, 345.

§ 370. Effect of statutes creating married women's statutory separate estates.

*Rule.* Statutes which secure to a married woman the separate use and enjoyment of her property, and which

*either do not refer to her contracts at all, or authorize contracts "relating to," or "with respect to," etc., such property, do not enable her to contract generally, but only in connection with such property. And there are three classes of contracts which may be authorized by these statutes, to wit: (1) Contracts binding the property in equity as if it were equitable separate property; (2) contracts falling within the classes expressly authorized by the words "with reference to," etc.; and (3) contracts necessary to the separate use and enjoyment of the property, as secured by the statute.*

The meaning of this rule is that statutes, such as have been passed in all the States, destroying the husband's common-law estates in his wife's property, and securing to the wife her own property to her own use, do not affect the general personal status of the wife, and give her no capacity to make any contract which is not in some way connected with the property so secured to her.<sup>1</sup> The classes of contracts which may be authorized by these statutes are discussed under the three following sections.<sup>2</sup>

1 Bank v. Porter, 90 U. S. 325, 332; Sykes v. Chadwick, 18 Wall. 141, 151; Hodges v. Price, 18 Fla. 342, 344; Jenne v. Marble, 37 Mich. 319, 321; Kenton v. McClellan, 43 Mich. 564, 565; Johnson v. Sutherland, 39 Mich. 579, 580; Russell v. People, 39 Mich. 671, 673; 33 Am. Dec. 444; Doyle v. Orr, 51 Miss. 229, 232; Bailey v. Pearson, 29 N. H. 77, 86; Huyler v. Atwood, 26 N. J. Eq. 504, 506; Eckert v. Reuter, 33 N. J. L. 266, 268; Kelso v. Tabor, 52 Barb. 125, 129; Morgan v. Andriot, 2 Hilt. 431, 432; *ante*, § 237.

2 This distinction is suggested in Bressler v. Kent, 61 Ill. 426, 430; 11 Am. Rep. 67; Todd v. Lee, 15 Wis. 365, 380.

### § 371. Contracts in equity under married women's separate property acts.

*Rule. A married woman's contracts which would be binding on her equitable separate property in equity are valid as against her statutory separate property in the same way.*

Courts of equity have long recognized a married woman's contracts with respect to her property secured

to her separate use by act of party—by deed, etc.;<sup>1</sup> and for the same reasons and to the same extent they enforce her contracts with reference to her separate property created by act of the State—by statute.<sup>2</sup> Though some courts have held that equity has nothing to do with the *legal* separate property of wives,<sup>3</sup> the rule states the prevailing opinion. But whether a particular contract is binding on a particular piece of property must depend on the rule which would determine, in the place where the contract is made,<sup>4</sup> whether the contract would be binding on the property if it were equitable separate estate, and the terms of the statute were the terms of the deed.<sup>5</sup> Thus, in New Jersey the contract must be beneficial or an express charge,<sup>6</sup> while in Kansas any contract is irrebutably presumed to be intended as a charge on the property.<sup>7</sup> So there are limitations to this capacity. If the wife has no power to dispose of the property, she cannot bind it by her contract,<sup>8</sup> and she can so bind it only to the extent and in the mode prescribed by statute,<sup>9</sup> if any is prescribed. If her husband's consent is required to her conveyances, it must accompany her contract.<sup>10</sup> On the principle that the naming of one power or mode of execution is a negation of all others,<sup>11</sup> if she is expressly authorized to make certain contracts or to contract in certain ways, she cannot make any other contracts or contract in any other way,<sup>12</sup> even equity.<sup>13</sup> But the fact that the law implies, from the terms of a statute, a capacity to make such contracts as are necessary to the enjoyment of her property secured by the statute, does not prevent her binding such property in equity by such contracts as would have bound her equitable separate property.<sup>14</sup>

1 Discussed *ante*, §§ 197-216.

2 *Johnson v. Cummins*, 16 N. J. Eq. 97, 104, 105. See *Bedford v. Burton*, 106 U. S. 338, 339, 340; *Donovan*, 41 Conn. 551, 557; *Cox v. Wood*, 20 Ind. 54, 59; *Scott*, 13 Ind. 225, 228; *Shields v. Keys*, 24 Iowa,

298, 313; *Flrst v. Haire*, 36 Iowa, 443, 446; *Wicks v. Mitchell*, 9 Kan. 80, 87; *Hall v. Eccleston*, 37 Md. 510, 520; *Pond v. Carpenter*, 12 Minn. 430, 432; *Doyle v. Orr*, 51 Miss. 229, 232; *Selph v. Howland*, 23 Miss. 261, 267; *Pemberton v. Johnson*, 46 Mo. 342, 343; *Perkins v. Elliott*, 22 N. J. Eq. 227, 229; 23 N. J. Eq. 526, 534, 535; *Penke v. Lehaw*, 21 N. J. Eq. 269, 282; *Wilson v. Brown*, 14 N. J. Eq. 277, 279; *Yale v. Dederer*, 18 N. Y. 265, 272, 279; *Ballin v. Dillaye*, 37 N. Y. 35, 37; *Corn v. Babcock*, 42 N. Y. 613, 628; *Patrick v. Little*, 36 Ohio St. 79, 83; *Graves v. Phillips*, 20 Ohio St. 371, 391; *Glass v. Warwick*, 40 Pa. St. 140, 145; *Hall v. Dotson*, 55 Tex. 520, 524; *Stockton v. Farley*, 40 W. Va. 171, 175; *Radford v. Carwile*, 13 W. Va. 573, 661, 671.

3 See *MacLay v. Love*, 25 Cal. 367, 382; *West v. Laraway*, 28 Mich. 464, 465; *Cain v. Bunkley*, 35 Miss. 119, 145.

4 See *post*, § 377.

5 *Scott*, 13 Ind. 225, 228. But see *Staley v. Hamilton*, 19 Fla. 275, 296; *ante*, §§ 206, 207.

6 *Perkins v. Elliott*, 23 N. J. Eq. 526, 531.

7 *Wicks v. Mitchell*, 9 Kan. 80, 87.

8 *Cox v. Wood*, 20 Ind. 54, 58, 59. See *Bressler v. Kent*, 61 Ill. 426, 430; 14 Am. Rep. 67; *Berry v. Bland*, 7 Smedes & M. 77, 83, 84; *Pond v. Carpenter*, 12 Minn. 430. But see 2 Bish. M. W. § 212.

9 See *infra*, notes 12, 13.

10 *Hall v. Eccleston*, 37 Md. 510, 520; *Townsley v. Chapin*, 12 Allen, 476, 479; *Selph v. Howland*, 23 Miss. 261, 267; *Radford v. Carwile*, 13 W. Va. 573, 671. But see *Thomas v. Passage*, 51 Ind. 106, 113; *Ward v. Servoss*, 15 Abb. Pr. 279, 280.

11 *Dreyfus v. Wolfe*, 65 Ala. 496, 498; *Kelso v. Tabor*, 52 Barb. 125, 129.

12 *Staley v. Hamilton*, 19 Fla. 275, 295; *Lillard v. Turner*, 16 Mon. B. 374, 376. See *Tracy v. Keith*, 11 Allen, 214, 215; *Robertson v. Bruner*, 21 Miss. 242, 244; *Whitworth v. Carter*, 43 Miss. 61, 71, 72; *Dunbar v. Meyer*, 43 Miss. 679, 685; *post*, § 376.

13 Cases *post*, § 376, n. 8. *Contra*, *Donovan*, 41 Conn. 551, 557; *Perkins v. Elliott*, 22 N. J. Eq. 127, 129; 23 N. J. Eq. 523, 534; *Graves v. Phillips*, 20 Ohio St. 371, 391.

14 *Todd v. Lee*, 15 Wis. 365, 380. See *Jones v. Crosthwaite*, 17 Iowa, 393, 403, 404.

## § 372. Implied power to contract under married women's separate property acts.

*Rule.* A married woman is not, with respect to her statutory separate property, a *femme sole*. She has by implication the capacity to make such contracts, and no others, as are necessary to the exercise of the capacities, or the enjoyment of the rights, expressly given her by the statute.

That is to say, the capacity to contract must be expressly given,<sup>1</sup> or it must be incidental and necessary

to the use and enjoyment of the property as the statute says it shall be used and enjoyed.<sup>2</sup> Under a statute providing that a married woman shall have over her property the same rights and powers as a *femme sole*, she may dispose of it,<sup>3</sup> or agree to dispose of it,<sup>4</sup> as a *femme sole*, even by power of attorney;<sup>5</sup> she may invest it,<sup>6</sup> or charge it for her debts;<sup>7</sup> she may do with respect to it whatever any other person can do with respect to his or her property.<sup>8</sup> But the power to hold and enjoy—the *jus tenendi*—is a very different power from the power to dispose of it—the *jus disponendi*;<sup>9</sup> and a statute which simply enables a married woman to “hold, use, enjoy, and possess her property as if single,” does not enable her to dispose of it as if single.<sup>10</sup> The power to dispose must be given expressly or by the clearest implication. In the case of merchandise,<sup>11</sup> and perhaps of all chattels,<sup>12</sup> the power to dispose is a necessary incident of ownership, and is given by implication with full ownership. There are cases which are in conflict with this reasoning, and imply the power of disposition even of realty from full ownership,<sup>13</sup> and there are other cases which would seem to deny all implied powers.<sup>14</sup> As to mere contracts, when a married woman may “hold, enjoy, and possess her property as if sole,” she may make all contracts necessary to such holding and enjoyment.<sup>15</sup> She may lease it,<sup>16</sup> contract for legal services with respect to it,<sup>17</sup> or manual labor upon it,<sup>18</sup> for cultivating<sup>19</sup> or repairing<sup>20</sup> it, for selling its crops,<sup>21</sup> and render it liable, at least to the extent of the income,<sup>22</sup> for her debts.<sup>23</sup> Whether the capacity to buy carries with it the capacity to buy on credit,<sup>24</sup> and whether the capacity to sell carries with it the capacity to agree to sell,<sup>25</sup> seems doubtful. When she may trade, she may make all contracts in the usual course of trade,<sup>26</sup> and buy tools

and instruments for use therein.<sup>27</sup> When she may manage her property, she may submit to arbitration a claim arising from damage to it.<sup>28</sup> When she may dispose, she may make any kind of disposition.<sup>29</sup> This implied capacity is not in conflict with her capacity in equity already considered; the two may exist side by side;<sup>30</sup> in fact, in some States, the capacity is implied only in equity.<sup>31</sup> According to the better view, however, the married woman is liable on contracts valid under this rule, not in equity, but at law.<sup>32</sup>

1 See *post*, §§ 373, 374, 375, rules.

2 Bressler v. Kent, 61 Ill. 426, 427; 14 Am. Rep. 67; Cole v. Van Riper, 44 Ill. 58; *infra*, n. 15.

3 Beal v. Warren, 2 Gray, 447, 459; Beard v. Redolph, 29 Wis. 136, 141; *ante*, §§ 203-205.

4 Dreutzer v. Lawrence, 53 Wis. 504, 508, 509; *post*, § 407.

5 Patton v. King, 26 Tex. 685, 686; *post*, § 406.

6 Reeper, 79 Mo. 352, 361.

7 Williams v. Hugunin, 69 Ill. 214, 219; 18 Am. Rep. 268; *ante*, § 238.

8 Beard v. Redolph, 29 Wis. 136, 141.

9 Cole v. Van Riper, 44 Ill. 58; Parent v. Callerland, 64 Ill. 97, 99; Bressler v. Kent, 61 Ill. 426, 430; 14 Am. Rep. 67; Miller v. Wetherby, 29 N. J. L. 287, 288; *ante*, §§ 205, 236.

10 Bressler v. Kent, 61 Ill. 426, 429, 430; 14 Am. Rep. 67; Vreeland, 16 N. J. Eq. 512, 524; Swift v. Luce, 27 Me. 285, 238; Moore v. Cornell, 68 Pa. St. 320, 322, 323; *supra*, n. 9.

11 Wieman v. Anderson, 42 Pa. St. 311, 317, 318.

12 See Brown v. Fifield, 4 Mich. 322, 327; Naylor v. Field, 29 N. J. L. 287, 288.

13 Harding v. Cobb, 47 Miss. 599, 603. See Scott, 13 Ind. 225, 227; Jones v. Crosthwaite, 17 Iowa, 393, 402; Kimm v. Weippert, 46 Mo. 532, 536; 2 Am. Rep. 541; Beard v. Redolph, 29 Wis. 136, 141.

14 Lillard v. Turner, 16 Mon. B. 374, 376; Selzer v. Campbell, 15 S. C. 581, 589.

15 Williams v. Hugunin, 69 Ill. 214, 219; 18 Am. Rep. 268; Cookson v. Toole, 59 Ill. 515, 519; Mitchell v. Carpenter, 50 Ill. 470, 521; Smith v. Howe, 31 Ind. 233, 234; Lindley v. Cross, 31 Ind. 106; Duren v. Getchell, 53 Me. 241, 248; Albin v. Lord, 39 N. H. 196, 201, 202; Freckling v. Rolland, 53 N. Y. 422, 425; Mahon v. Gormley, 24 Pa. St. 80; Wieman v. Anderson, 42 Pa. St. 311, 317, 318; Wright v. Blackwood, 57 Tex. 644, 648; Krouskop v. Shontz, 57 Wis. 204, 214; Meyers v. Rahte, 46 Wis. 655, 658; Beard v. Redolph, 29 Wis. 136, 141; Leonard v. Rogan, 20 Wis. 540, 542; Todd v. Lee, 15 Wis. 365, 368.

16 Parent v. Callerland, 64 Ill. 97, 99.

17 Leonard v. Rogan, 20 Wis. 540, 542; *post*, § 463.

18 Cookson v. Toole, 59 Ill. 515, 519, 520.

- 19 Mitchell v. Carpenter, 50 Ill. 470.
- 20 Beard v. Redolph, 29 Wis. 136, 141.
- 21 Cookson v. Toole, 59 Ill. 515, 521.
- 22 See Cox v. Ward, 20 Ind. 54, 53, 53.
- 23 Williams v. Hugunin, 69 Ill. 214, 219; 13 Am. Rep. 263.
- 24 Tiemeyer v. Turnquist, 85 N. Y. 516, 521; 39 Am. Rep. 674; *ante*,  
 § 223.
- 25 See Felkne v. Tighe, 39 Ark. 357, 361, 362; Stedham v. Matthews,  
 29 Ark. 650, 653; Shroyer v. Nickell, 57 Mo. 264, 268; Baker v. Hathway,  
 5 Allen, 103, 105; Love v. Watkins, 40 Cal. 547, 561; 6 Am. Rep. 624.
- 26 Frecking v. Rolland, 53 N. Y. 422, 425.
- 27 Williamson v. Dodge, 5 Hun, 498, 499; Dayton v. Walsh, 47 Wis.  
 113, 120; 32 Am. Rep. 757.
- 28 Duren v. Getchell, 55 Me. 241, 248.
- 29 Smith v. Wilson, 2 Met. (Ky.) 235, 237; Pond v. Carpenter, 12  
 Minn. 430, 432, 433; Hall v. Dotson, 55 Tex. 520, 524; *ante*, § 236.
- 30 Todd v. Lee, 15 Wis. 365, 380.
- 31 Huyler v. Atwood, 26 N. J. Eq. 504, 506.
- 32 See cases *supra*, n. 15.

§ 373. Express power to contract under married women's separate property acts.

*Rule.* When the statute authorizes a married woman to contract "with reference to," "with respect to," etc., her separate property, her contracts to be valid must be "with reference to," etc., her said property.

On the principle that *expressum unius est exclusio alterius*, the enumeration in a statute of certain contracts which a married woman may make is a denial of her capacity to make any others;<sup>1</sup> but it is probable that statutes providing that a married woman's contracts with reference to her property should be valid, are simply attempts to create a rule in law which had previously existed as to equitable separate property in equity,<sup>2</sup> so that there would be no conflict between this rule and the rule already discussed.<sup>3</sup> What contracts do relate to property under these statutes has been frequently under discussion. The following contracts do relate to, concern, refer to, and respect a married woman's statutory separate property: Contracts for the



direct benefit of the same,<sup>4</sup> for selling,<sup>5</sup> leasing,<sup>6</sup> mortgaging,<sup>7</sup> cultivating,<sup>8</sup> improving,<sup>9</sup> stocking,<sup>10</sup> fencing,<sup>11</sup> repairing,<sup>12</sup> supplying with laborers,<sup>13</sup> or with tools,<sup>14</sup> the said property; also a covenant for title in a deed of the same;<sup>15</sup> an agreement for the sale of the same,<sup>16</sup> but not for the purchase of the same;<sup>17</sup> a purchase of furniture for her separate house,<sup>18</sup> or of a horse,<sup>19</sup> or tools,<sup>20</sup> for farming her separate farm. Whether a purchase of property for her separate use is a contract relating to her separate property is disputed;<sup>21</sup> the better opinion seems to be that the obligation to pay arises only after, or at the same moment as, the property vests, and that therefore it is separate property when the promise to pay for it is made, and the latter is thus a contract with reference to it.<sup>22</sup> Whether a promise to pay money, when a woman has no other separate property, is a contract relating to her separate property has been questioned.<sup>23</sup> A contract buying a horse for pleasure riding,<sup>24</sup> or supplies for the family,<sup>25</sup> or a contract whereby a married woman borrows the money to buy her separate property,<sup>26</sup> or a contract of suretyship,<sup>27</sup> is not a contract relating to her separate property. Still, in some States the law raises a presumption that a married woman intends every contract to be with reference to her separate property,<sup>28</sup> or every contract which benefits her.<sup>29</sup>

1 Referred to *ante*, § 371, rule; *post*, § 376, rule.

2 See *Albin v. Lord*, 39 N. H. 196, 203, 204; *Peake v. Lebow*, 21 N. J. Eq. 269, 282; *Yale v. Dederer*, 18 N. Y. 265, 272, 279; *Walker v. Reamy*, 37 Pa. St. 410, 414.

3 *Ante*, §§ 237, 372.

4 *Russel v. People*, 39 Mich. 671, 674.

5 *Bailey v. Pearson*, 29 N. H. 196, 202.

6 *Vandervoort v. Gould*, 36 N. Y. 639, 643.

7 *Marlow v. Barlew*, 53 Cal. 456, 459.

8 *Bosford v. Pearson*, 7 Allen, 504, 505.

9 *Burr v. Swan*, 113 Mass. 588, 589.

10 *Batchelder v. Sargent*, 47 N. H. 262, 264, 265.



- 11 *Albin v. Lord*, 30 N. H. 196, 202.
- 12 *Parker v. Kane*, 4 Allen, 346, 347.
- 13 See *Cookson v. Toole*, 59 Ill. 515, 520; *supra*, n. 10.
- 14 *McCormick v. Holbrook*, 22 Iowa, 437, 439.
- 15 *Richmond v. Tibbles*, 26 Iowa, 474, 476; *Bosford v. Pearson*, 7 Allen, 504, 505.
- 16 *Richmond v. Tibbles*, 26 Iowa, 471, 476; *Baker v. Hathway*, 5 Allen, 103, 104, 105; *Bosford v. Pearson*, 7 Allen, 504, 505; *Durfee v. McClurg*, 6 Mich. 223, 232.
- 17 *Jones v. Crosthwaite*, 17 Iowa, 393, 402.
- 18 *Tillman v. Shackleton*, 51 Mich. 447, 454, 455.
- 19 *Mitchell v. Smith*, 32 Iowa, 484, 487.
- 20 See *Batchelder v. Sargent*, 47 N. H. 262, 264.
- 21 *Messer v. Smyth*, 58 N. H. 298, 299; *infra*, n. 22.
- 22 *Messer v. Smyth*, 58 N. H. 298, 299-301. S. P., *Adams v. Charter*, 46 Conn. 551, 554; *Tillman v. Shackleton*, 15 Mich. 447, 456; *Huyler v. Atwood*, 26 N. J. Eq. 504, 507; *Tiemeyer v. Turnquist*, 85 N. Y. 516, 522; 39 Am. Rep. 674; *Cramer v. Hanaford*, 53 Wis. 85, 87.
- 23 *Butler v. Barber*, 54 Cal. 178, 179.
- 24 *McDermott v. Garland*, 1 Mackey, 496.
- 25 *Schneider v. Garland*, 1 Mackey, 350.
- 26 *Ames v. Foster*, 42 N. H. 381, 385. But see *Cashman v. Henry*, 75 N. Y. 103, 103; 31 Am. Rep. 437.
- 27 *Russel v. People*, 39 Mich. 671, 673; *Huyler v. Atwood*, 26 N. J. Eq. 504, 506.
- 28 *Wicks v. Mitchell*, 9 Kan. 80, 85, 87, 88.
- 29 *Huyler v. Atwood*, 26 N. J. Eq. 504, 506.

§ 374. Effect of statutes expressly authorizing or prohibiting specified contracts.

*Rule.* Statutes expressly authorizing or prohibiting certain specified contracts are strictly construed, and, respectively, neither authorize nor prohibit any contracts not specified; but statutes expressly authorizing specified contracts may, by implication, prohibit all others, and contracts expressly prohibiting certain contracts may, by implication, authorize others.

Under a statute which authorizes one kind of contract no other can be made;<sup>1</sup> thus, when a married woman is empowered to dispose of her property by sale, she cannot dispose of it by gift.<sup>2</sup> The only capacities implied are those which are necessarily incidental to rights or capacities expressly given.<sup>3</sup> And so, on

the other hand, when certain contracts are prohibited, the prohibition will not be extended by construction;<sup>4</sup> thus, when contracts between husband and wife are prohibited, contracts of the wife as surety of her husband are nevertheless valid.<sup>5</sup> Moreover, on the principle that the naming of one capacity is by implication a negation of all others,<sup>6</sup> when a married woman is authorized to make certain contracts, or to make contracts executed with certain formalities, she is impliedly restrained from making any others, even in equity.<sup>7</sup> And the prohibition of certain contracts in a statute may make clear the intention of the legislature to authorize all other contracts of the class to which the prohibited contract belongs; thus, under a statute authorizing a married woman to acquire property, "provided that no acquisition from her husband in prejudice of the rights of his creditors shall be valid," authorizes her to acquire from her husband in all cases when the rights of his creditors are not prejudiced.<sup>8</sup>

1 Abshire v. State, 53 Ind. 64, 67; Sturmfeltz v. Frickey, 43 Md. 563, 571; Robertson v. Bruner, 24 Miss. 242, 244. See *post*, § 376, n. 8.

2 Mott v. Smith, 16 Cal. 535, 536.

3 Discussed *ante*, § 373.

4 See Ingoldsby v. Juan, 12 Cal. 575; Maclay v. Love, 25 Cal. 381; *ante*, § 16.

5 Major v. Holmes, 124 Mass. 108, 109.

6 Kelso v. Tabor, 52 Barb. 125, 129. See *ante*, § 372; *post*, § 376.

7 Staley v. Hamilton, 19 Fla. 275, 295.

8 Trader v. Lowe, 45 Md. 1, 14. See Goree v. Walthall, 44 Ala. 161, 164, 165; Kingsley v. Gilman, 15 Minn. 59, 60, 61.

§ 375. Effect of statutes expressly authorizing married women to contract as if unmarried.

*Rule.* Under a statute expressly enabling a married woman to contract as if unmarried, she may make contracts generally, entirely unaffected by her coverture, but it is doubtful whether she may make contracts directly with her husband.

When the statute says that she may contract as if sole, it is presumed to mean it;<sup>1</sup> her contracts are not affected by coverture at all;<sup>2</sup> she may make all kinds of contracts which an unmarried woman may make,<sup>3</sup> including contracts of suretyship,<sup>4</sup> promissory notes,<sup>5</sup> contracts binding her equitable separate property,<sup>6</sup> etc. An implied promise rises against her in cases when it would rise against a *femme sole*.<sup>7</sup> And on her contracts made under such a contract she is liable at law and in damages.<sup>8</sup> But when her contracts with her husband are considered, other principles are brought into play.<sup>9</sup>

1 Edwards v. Schoeneman, 104 Ill. 278, 283.

2 Worthington v. Cooke, 52 Md. 297, 308.

3 See Pelzer v. Campbell, 15 S. C. 581, 601; 40 Am. Rep. 705; *infra*, n. 4.

4 Hart v. Grigsby, 14 Bush, 542; Mayo v. Hutchinson, 57 Me. 546; Major v. Holmes, 124 Mass. 108, 103; Witte v. Wolfe, 16 S. C. 256, 263, 269; Pelzer v. Campbell, 15 S. C. 581, 601; 40 Am. Rep. 705.

5 See Messer v. Smyth, 58 N. H. 298, 299.

6 Witte v. Wolfe, 16 S. C. 256, 263, 269.

7 Spafford v. Warren, 47 Iowa, 47, 51; Hickson v. Williams, 41 N. J. L. 35, 38; Ackley v. Westervelt, 86 N. Y. 448, 453; *post*, § 381.

8 Worthington v. Cooke, 52 Md. 297, 298.

9 Discussed *ante*, § 43.

### § 376. Effect of statutes requiring formalities.

*Rule.* If a statute which enables a married woman to contract requires her contracts to be executed in a certain way, this requirement must be substantially complied with to give her contract any validity; but if she has the capacity to contract independently of the statute which requires the formalities, a contract not complying therewith may still be valid.

This rule has reference, more especially, to deeds of married women. Before the legislatures began to secure married women's property to their separate use, they provided for their release of dower, and their conveyance of the reversion in their realty, by joint deed with their husbands; and these statutes usually re-

quired the wife's acknowledgment to be taken apart from her husband, and to be accompanied by her declaration that she acted freely and of her own accord.<sup>1</sup> Under such statutes, there is no question but that the deed of a married woman not so executed was absolutely void;<sup>2</sup> for the statute gave her a power, the only power that she had, and the deed not being a good execution of the power was not valid under the statute, and could not be valid by virtue of any other capacity of hers, because she had none.<sup>3</sup> Such a deed could not ratify;<sup>4</sup> any act of hers to make it good would have to be equivalent to a new deed,<sup>5</sup> and would not relate back but would take effect only from the time of its execution.<sup>6</sup> Nor, probably, could the legislature cure the defect in such a deed.<sup>7</sup> Nor could such a deed be reformed, perfected, or enforced in equity,<sup>8</sup> for though it lies within the peculiar province of equity to reform defective deeds,<sup>9</sup> and enforce them as agreements to give deeds,<sup>10</sup> this jurisdiction of equity is founded on the general capacity of the parties to contract,<sup>11</sup>—a capacity which a married woman did not have;<sup>12</sup> and besides, equity could not reform or perfect the execution of a statutory power.<sup>13</sup> Of course, the above reasoning does not apply to deeds of equitable separate property in States where a married woman holds such property as if sole.<sup>14</sup> How far it applies to statutory separate estate is the difficult question. As to this property, it is generally said that it cannot be conveyed unless the statute so provides,<sup>15</sup> and that it can be conveyed only in the mode prescribed by statute.<sup>16</sup> A married woman's implied power to dispose of her statutory separate estate has already been discussed.<sup>17</sup> Where she has no implied power, and there is no express power given, she conveys it just as she conveyed her property at common law.<sup>18</sup> Where there is an ex-

press power given, but it is coupled with a provision that it must be executed in a certain way, then a deed not so executed would be void,<sup>19</sup> like the deeds already discussed. Where she is expressly empowered to convey "as if unmarried," though there is a further provision that her husband must join,<sup>20</sup> her defective deed, or deed not properly acknowledged and recorded, provided that if her husband's joinder is required he has joined, is valid between the parties,<sup>21</sup> and may be corrected and enforced in equity as if it were the deed of an unmarried woman.<sup>22</sup> So if she has the power to contract generally,<sup>23</sup> or to contract with reference to her property,<sup>24</sup> her defective deed may be enforced as a contract in equity,<sup>25</sup> or she may be estopped thereby.<sup>26</sup> It is therefore only when a married woman has the capacity to convey as if sole, or the general capacity to contract personally or with reference to her property, that her deeds not executed with the formalities required by statute for deeds can have any validity whatever. As already suggested, she may be required to execute a deed as if sole, or under a particular statute relating only to married women. Under the latter statutes, the privy acknowledgment is absolutely necessary,<sup>27</sup> and the certificate on the deed must show that all the formalities required by the law have been conformed to.<sup>28</sup> The certificate cannot be aided by outside proof,<sup>29</sup> or corrected in equity.<sup>30</sup> Substantial compliance with the statute is, however, all that is required, the precise words of the statute need not be used.<sup>31</sup> The certificate is *prima facie* evidence,<sup>32</sup> but is not conclusive<sup>33</sup> that the law has been complied with, and except as against *bona fide* purchasers,<sup>34</sup> it may be impeached.<sup>35</sup>

1 See discussion in 2 Scribner Dow. ch. 13; *post*, §§ 394-403.

2 *Holland v. Moon*, 39 Ark. 120, 124; *Leonis v. Lazzarovich*, 55 Cal. 52, 57; *Gebb v. Rose*, 40 Md. 387, 392; *Shroyer v. Nickell*, 55 Mo. 264, 267, 268; *Rosenthal v. Mayhugh*, 33 Ohio St. 155, 159; *Gillespie v.*

Warford, 2 Cold. 622, 623, Cross v. Everts, 23 Tex. 523, 532; *infra*, n. 8.

3 See Shroyer v. Nickell, 55 Mo. 264, 267; Silliman v. Cummins, 13 Ohio, 116, 119.

4 Buchanan v. Hagned, 95 Pa. St. 240, 243.

5 Miller v. Shackelford, 3 Dana, 289, 297.

6 Doe v. Howland, 8 Cowen, 277, 284; 18 Am. Dec. 445.

7 Discussed *post*, § 378.

8 Williams v. Walker, Law R. 9 Q. B. D. 576, 581; Drury v. Foster, 2 Wall. 24, 34; Holland v. Moon, 33 Ark. 120, 124; Stidman v. Matthews, 29 Ark. 650, 658, 662; Simpson v. Montgomery, 25 Ark. 365, 373; Leonis v. Lazzarovich, 55 Cal. 52, 55; Atwater v. Buckingham, 5 Day, 492, 497; Breit v. Yeaton, 101 Ill. 242, 262; Patterson v. Lawrence, 90 Ill. 174, 180; 32 Am. Dec. 22; Lindley v. Smith, 58 Ill. 250; Martin v. Hargardine, 46 Ill. 422, 425; Rogers v. Higgins, 48 Ill. 211, 216; Stevens v. Parish, 29 Ind. 260, 263; Grapengether v. Fejervary, 9 Iowa, 163, 173; Blackburn v. Pennington, 8 Mon. B. 217; Johnson v. Reardon, 11 Md. 465, 469, 470; Gebb v. Rose, 40 Md. 387, 394; Townsley v. Chapin, 12 Allen, 476, 479; Hord v. Taubman, 79 Mo. 101, 104; White, 16 N. J. L. 202, 214; Marvin v. Smith, 46 N. Y. 571, 574; Wiswall v. Hall, 3 Paige, 313, 317; Knowles v. McCauly, 10 Paige Ch. 342, 347; Green v. Branton, 1 Dev. Eq. 500, 503; Purcell v. Goshorn, 17 Ohio, 105, 124; 49 Am. Dec. 448; Davenport v. Savil, 6 Ohio St. 559, 566; Carr v. Williams, 16 Ohio, 305, 310; 36 Am. Dec. 87; Roseburgh v. Sterling, 27 Pa. St. 292, 293; Wright v. Dufield, 58 Tex. 218, 225; Cross v. Everts, 23 Tex. 523, 532.

9 Simpson v. Montgomery, 25 Ark. 365, 373.

10 See Gebb v. Rose, 40 Md. 387, 393.

11 Shroyer v. Nickell, 55 Mo. 264, 267.

12 Discussed *ante*, §§ 197-216.

13 Bright v. Boyd, 1 Story, 478, 487; McBride v. Wilkinson, 29 Ala. 662, 667; Ellet v. Wade, 47 Ala. 456, 464; Moreau v. Detchemendy, 18 Mo. 522, 531; Silliman v. Cummins, 13 Ohio, 116, 118. *Contra*, Clayton v. Frazier, 33 Tex. 91, 100.

14 Gebb v. Rose, 40 Md. 387, 392. See Jones v. Reese, 65 Ala. 134, 141; Chew v. Beall, 13 Md. 348, 360; Finch v. Marks, 76 Va. 207, 209.

15 Bressler v. Kent, 61 Ill. 426, 429; 14 Am. Rep. 67.

16 Gilchrist v. Borie, 1 Dev. & B. Eq. 346, 359; *supra*, notes 1, 8.

17 *Ante*, § 372.

18 Bressler v. Kent, 61 Ill. 426, 429; 14 Am. Rep. 67; Grapengether v. Fejervary, 9 Iowa, 163, 173; Gebb v. Rose, 40 Md. 387, 392; Young, 7 Cold. 461, 479; Lightfoot v. Boss, 8 Lea, 350, 351; Hawley v. Troyman, 29 Gratt. 728, 729; Radford v. Carwile, 18 W. Va. 573, 670; Taylor v. Meade, 4 DeGex, J. & S. 597, 607.

19 Silliman v. Cummins, 13 Ohio, 116, 118; cases cited *supra*, nn. 1, 8.

20 See Hall v. Eccleston, 37 Md. 510, 520.

21 See Scranton v. Stewart, 52 Ind. 68, 89.

22 See Redford v. Morton, 106 U. S. 338, 341; Edwards v. Schoeneman, 104 Ill. 278, 284; Scranton v. Stewart, 52 Ind. 68, 89; Phillips v. Graves, 20 Ohio St. 371, 389; Dreutzer v. Lawrence, 58 Wis. 594, 598, 599.

23 See Love v. Watkins, 40 Cal. 547, 559; 6 Am. Rep. 624; *ante*, § 376.

24 Baker v. Hathway, 5 Allen, 103, 105; *ante*, §§ 374, 375.

25 Silliman v. Cummins, 13 Ohio, 116, 119.

26 Powell, 93 Pa. St. 403, 413. Otherwise no estoppel; Leonis v. Lazzarovich, 55 Cal. 52, 53; Drury v. Foster, 2 Wall. 24, 33; South. Law Rev. Oct. 1882, article by Hon. S. D. Thompson; *post*, §§ 403-420.

27 Deed is mere waste paper without: Cross v. Everts, 23 Tex. 523, 532; Mariner v. Saunders, 5 Gilm. 125; Leonis v. Lazzarovich, 55 Cal. 52, 57.

28 Bagby v. Emberson, 79 Mo. 139, 140; Gill v. Fauntleroy, 8 Mon. B. 177, 180; Boiling v. Teal, 76 Va. 487, 494; Mullins v. Weaver, 57 Tex. 5, 6.

29 Jourdan, 9 Serg. & R. 263, 274; 11 Am. Dec. 724. See Elliott v. Peirsol, 1 McLean, 11; 1 Peters, 323; Pendleton v. Button, 3 Conn. 406, 412; Martin v. Hargardine, 46 Ill. 322, 325; O'Ferrall v. Simplot, 4 Iowa, 381; Smith v. Hunt, 13 Ohio, 260, 268; 42 Am. Dec. 201.

30 Barnett v. Shackelford, 6 Marsh. J. J. 532, 534; 22 Am. Dec. 100; Silliman v. Cummins, 13 Ohio, 116, 118; *supra*, n. 8.

31 Muir v. Galloway, 61 Cal. 438, 502; Gregory v. Ford, 5 Mon. B. 471, 481; Brown v. Farran, 3 Ohio, 140, 155.

32 Young v. Duvall, 109 U. S. 573, 577; Smith v. McGuire, 67 Ala. 34, 37; Priest v. Cummings, 16 Wend. 617, 631.

33 Eyser v. Hathaway, 50 Ill. 521, 524; Ford v. Teal, 7 Bush, 176, 153; Marsh v. Mitchell, 26 N. J. Eq. 497, 499; Loudon v. Blythe, 16 Pa. St. 532, 542; 27 Pa. St. 22, 25; 55 Am. Dec. 527.

34 De Arnaz v. Escandon, 59 Cal. 486, 489; Kerr v. Russell, 69 Ill. 666, 670; 18 Am. Rep. 33; Johnston v. Wallace, 53 Miss. 331, 337; 24 Am. Rep. 699; Baldwin v. Snowden, 11 Ohio St. 203, 212; Shrader v. Decker, 9 Pa. St. 14, 16; Loudon v. Blythe, 27 Pa. St. 22, 25; Hill v. Patterson, 51 Pa. St. 289, 290; Davis v. Kennedy, 53 Tex. 516, 519; Harkins v. Forsythe, 11 Leigh, 294, 304.

35 Cridge v. Hare, 98 Pa. St. 561, 565; *supra*, notes 33, 34.

## § 377. Effect of statutes, local and foreign.

*Rule.* *The capacity of a married woman to contract personally, or as to movables, depends on the law of the place where the contract is made; to contract as to immovables, on the law of the place where they lie.*

Though the general rule is that the validity of married women's contracts, like that of other contracts, depends on the law of the State where they are made,<sup>1</sup> there is another view, that this depends on the law of their domicile.<sup>2</sup> There is much confusion among the cases relating to this subject. The points decided have already been discussed.<sup>3</sup>

1 Scudder v. Union, 91 U. S. 406, 411; Drake v. Glover, 30 Ala. 382, 383; Nixon v. Halley, 78 Ill. 611, 615; Halley v. Ball, 66 Ill. 250, 252; Baldwin v. Gray, 16 Mart. (La.) 192, 193; Saul v. Creditors, 17 Mart. (La.) 561, 537; Andrews v. Creditors, 11 La. 464, 476; Bell v. Packard, 60 Me. 105, 110; 31 Am. Rep. 251; Bank v. Williams, 46 Miss. 618, 629; 12 Am. Rep. 319; Millikin v. Pratt, 125 Mass. 374, 377, 381; 28 Am. Rep. 241; Ross, 129 Mass. 243, 246; Wright v. Remington, 41 N. J. L. 48, 51;



*Pearl v. Hansborough*, 9 *Humph.* 426, 435; *Holmes v. Reynolds*, 55 *Vt.* 33, 41; *De Greuchy v. Wills*, *Law R.* 4 C. P. D. 362, 364; *Dacey Dom.* p. 195.

2 *Dow v. Gould*, 31 *Cal.* 629, 652; *Frierson v. Williams*, 57 *Miss.* 451, 462. See *Kelly v. Davis*, 28 *La. An.* 773, 774; *ante*, § 33, 34.

3 *Ante*, § 37.

§ 378. Prospective and retrospective effect of acts.—The validity of a contract, and the rights of the parties thereunder, depends upon the law existing at the time it is made.<sup>1</sup> Thus, a statute providing that "all contracts of married women shall be valid," does not affect existing ones,<sup>2</sup> and a note made before the passage of such an act is invalid, though delivered thereafter;<sup>3</sup> but if delivery is authorized afterwards the note is good.<sup>4</sup> There is much dispute as to whether a statute can cure the defects in deeds of married women.<sup>5</sup> The remedy can be changed from law to equity.<sup>6</sup>

1 *Edwards v. Schoeneman*, 104 *Ill.* 273, 282; *Loomis v. Brush*, 33 *Mich.* 40, 47; *Eckert v. Reuter*, 31 *N. J. L.* 133; *ante*, § 19-23.

2 *Lee v. Lanahan*, 59 *Me.* 478, 481; *Bryant v. Merrill*, 55 *Me.* 515, 516.

3 *Taylor v. Boardman*, 92 *Ill.* 566, 568; *ante*, § 338.

4 *Taylor v. Boardman*, 92 *Ill.* 563, 568.

5 Discussed *ante*, § 23.

6 *Williams v. King*, 43 *Conn.* 539, 571; *ante*, § 23, n. 13.

§ 378 a. The statutes in the different States.—It is not within the plan of this work to discuss minutely the state of the law on any particular topic in each particular State, but some recent cases which seem to cover the subject of contracts of married women in different States very fully are cited in a note.<sup>1</sup>

1 *Marlow v. Barlew*, 53 *Cal.* 456, 459; *Leonis v. Lazzarovich*, 55 *Cal.* 52, 55-59; *Wells v. Caywood*, 3 *Colo.* 437, 494; *Williams v. Hugunin*, 69 *Ill.* 214, 218; 18 *Am. Rep.* 697; *Thomas v. Passage*, 54 *Ind.* 106, 111-113; *Spafford v. Warren*, 47 *Iowa*, 47, 51; *Yates v. Larvey*, 65 *Me.* 221, 222; *Jenne v. Marble*, 57 *Mich.* 319, 321; *Reed v. Burrs*, 44 *Mich.* 80, 82; *Musick v. Dodson*, 76 *Mo.* 319, 321; 43 *Am. Rep.* 750; *State v. Scott*, 10 *Neb.* 83, 86; *Messer v. Smith*, 53 *N. H.* 238, 239; *Eckert v. Reuter*, 33 *N. J. L.* 266, 270; *Huyler v. Atwood*, 26 *N. J. Eq.* 504, 506; *Saratoga v. Pruyn*, 90 *N. Y.* 250, 254; *Dougherty v. Sprinkle*, 83 *N. C.* 300, 302, 304; *Pippen v. Wesson*, 74 *N. C.* 437, 447, 455; *Ross v. Lunder*, 12 *S. C.* 592, 594; *Houghton v. Milburn*, 51 *Wis.* 554, 563, 564; *Kruskop v. Shontz*, 51 *Wis.* 204, 208, 218; *Kavanaugh v. O'Neill*, 53 *Wis.* 101, 105.



## ARTICLE III.—SPECIAL KINDS OF CONTRACTS

- § 379. Contracts *in personam* and *in rem*.
- § 380. Executory and executed contracts.
- § 381. Express and implied contracts.
- § 382. Contracts made alone and jointly with husband.
- § 383. Purchases and sales.
- § 384. Covenants and bonds.
- § 385. Promissory notes.
- § 386. Releases and receipts.
- § 387. Rent, repairs, and family expenses.
- § 388. Submission to arbitration.
- § 389. Employment of agents.
- § 390. Liabilities as stockholder.
- § 391. Contracts as surety.
- § 392. Contracts as trader.
- § 393. Miscellaneous contracts, etc.

§ 379. Contracts of married women in *personam* and in *rem*.—In considering the contracts of a married woman it is important to distinguish between her personal contracts, which bind her personally, and her contracts with reference to her separate property, which are binding thereupon.<sup>1</sup> The distinction originated in equity, which recognized her separate ownership of property settled to her sole and separate use, and her capacity to change the same with her contracts.<sup>2</sup> Such contracts were not enforceable against her personally, but only against the property, which became a kind of artificial person,<sup>3</sup> in a proceeding *in rem*.<sup>4</sup> And so, under statutes creating statutory separate estate, the courts continued to hold that her contracts to be valid should be “with reference” to her estate,<sup>5</sup> and that mere personal contracts were void,<sup>6</sup> unless expressly authorized.<sup>7</sup> The distinction, originally one both of capacity and of remedy, has in some States under the statutes become one of capacity only, the woman being liable as if

unmarried on all contracts made with reference to her estate.<sup>8</sup> On this point, however, much confusion exists.<sup>9</sup>

1 See *Grissell*, 12 Ch. Div. 484; *Worthington v. Cooke*, 32 Md. 297, 308; *Pawley v. Vogel*, 42 Mo. 291, 302; *Walker v. Deaver*, 79 Mo. 664, 674; *Dougherty v. Sprinkle*, 88 N. C. 300, 302; *Smith v. Gooch*, 83 N. C. 276; *Groene v. Frondhof*, 1 Disn. 504, 505.

2 Discussed *ante*, §§ 206, 207.

3 *Dougherty v. Sprinkle*, 83 N. C. 300, 302.

4 *Pawley v. Vogel*, 42 Mo. 291, 302, 301; *ante*, § 211.

5 *Russel v. People*, 39 Mich. 671, 673; *ante*, § 370.

6 *Bank v. Porter*, 99 U. S. 325, 332; *ante*, § 270.

7 See *Bailey v. Pearson*, 29 N. H. 76, 87; *ante*, § 371.

8 See *Kavanaugh v. O'Neill*, 54 Wis. 101, 106; *ante*, §§ 372, 373.

9 See *Eckert v. Reuter*, 33 N. J. L. 266, 263; *Dougherty v. Sprinkle*, 88 N. C. 300, 304; *ante*, §§ 211, 237-239, 370, 372, 373.

‡ 380. **Executory and executed contracts.**—There is among the cases frequent reference made to a distinction between executory and executed contracts of married women, all the latter being said to be void unless the married woman had the capacity to contract generally.<sup>1</sup> The real distinction seems, however, to be between contracts binding a married woman personally and contracts binding her property,<sup>2</sup> as promises to pay money if charged on her property are valid, though executory,<sup>3</sup> and as she may, by complying with the same formalities, bind her property by an agreement to give a deed as well as by a deed itself.<sup>4</sup> However she may be estopped by her agreement to perform a statutory power,<sup>5</sup> she cannot be compelled to specifically perform such a contract.<sup>6</sup>

1 *Stevens v. Parish* 29 Ind. 260, 263; *Shroyer v. Nickell*, 55 Mo. 264, 263; *Andriot v. Lawrence*, 33 Barb. 142, 143.

2 Discussed *ante*, § 379.

3 *Girault v. Adams*, 61 Md. 8, 13; *ante*, § 206.

4 See *Townsley v. Chapin*, 12 Allen, 476, 478; *Donkel v. Hunter*, 61 Pa. St. 382, 384; *post*, § 407.

5 See *Felkne v. Tighe*, 39 Ark. 357, 363; *post*, § 407.

6 *Bright v. Boyd*, 1 Story, 478, 487; *post*, § 407.

§ 381. Express and implied contracts of married women.

—A promise will not be implied by law when the law would not recognize an express promise;<sup>1</sup> so that, at common law, there was no implied *assumpsit* against a married woman;<sup>2</sup> and her payment during coverture on account of an antenuptial debt did not affect the running of the Statute of Limitations.<sup>3</sup> But when she can contract she may be suable on the common counts;<sup>4</sup> if she occupies premises, the law raises an implied promise to pay rent;<sup>5</sup> if she orders materials, the law implies a contract to pay for them.<sup>6</sup> But if she buys necessities, the implied promise is one of the husband's,<sup>7</sup> for he is liable therefor.<sup>8</sup> And if she receives money claimed by another, there is no implied promise to pay it back.<sup>9</sup>

1 Tucker v. Cocke, 32 Miss. 184, 190; Farrar v. Bessey, 24 Vt. 89, 91.

2 Tucker v. Cocke, 32 Miss. 184, 190.

3 Farrar v. Bessey, 24 Vt. 89, 92.

4 Hickson v. Williams, 41 N. J. L. 35, 38; Spafford v. Warren, 47 Iowa, 47, 51.

5 Ackley v. Westervelt, 86 N. Y. 448, 453; *post*, § 387.

6 Vail v. Meyer, 71 Ind. 160, 163.

7 Shaw v. Thompson, 16 Pick. 178, 200; 26 Am. Dec. 655.

8 Discussed *ante*, §§ 64, 81, 95.

9 Platt v. Hawkins, 43 Conn. 139, 143.

§ 382. Contracts of married women alone and jointly with their husbands. — The joinder of a husband with his wife does not, independently of statute, affect her capacity to contract,<sup>1</sup> for the status of married women cannot be destroyed by agreement;<sup>2</sup> so that the joint bond<sup>3</sup> or note<sup>4</sup> of husband and wife is the note or bond of the husband alone. But a husband's joinder in his wife's disposition of property to which he is entitled by his marriage rights makes such disposition effectual.<sup>5</sup> His joinder may be required by statute,<sup>6</sup> and in such cases he may so contract as not to bind himself,<sup>7</sup> this being the effect of his joinder in Louisiana.<sup>8</sup> When

he joins, his wife is not discharged of her obligation by the adjudication that he is a bankrupt.<sup>9</sup> Whether a wife must have her husband's joinder to a contract with reference to her separate property when she cannot dispose of such property without his joinder, does not seem to be settled; some cases seem to infer the negative,<sup>10</sup> while others point towards the affirmative.<sup>11</sup> It is a general rule that a married woman cannot bind by contract property which she cannot dispose of.<sup>12</sup>

1 Marshall v. Rutton, 8 Term Rep. 545, 546; *infra*, notes 3, 4.

2 Stewart M. & D. §§ 172, 181.

3 Dorrance v. Scott, 3 Whart. 309, 313; 31 Am. Dec. 509; *post*, § 384.

4 Cummings v. Wilkie, 3 Grant Cas. 146, 147; *post*, § 385.

5 See Palmer v. Davis, 23 N. Y. 242, 247; *ante*, § 348.

6 See more fully, *post*, § 399.

7 By expressly reserving his immunity.

8 Lehman v. Barrow, 23 La. An. 185, 188.

9 Allers v. Forbes, 59 Md. 374, 376.

10 Thomas v. Passage, 54 Ind. 106, 113; Major v. Symmes, 19 Ind. 117, 120; Ward v. Servoss, 15 Abb. Pr. 279, 280.

11 Matthews v. Murchison, 17 Fed. Rep. 760, 767; Pierce v. Osman, 79 Ind. 259, 260; Hall v. Eccleston, 37 Md. 510, 520; Townsley v. Chapin, 12 Allen, 476, 479; Cozzens v. Whitney, 3 R. I. 79, 83; *post*, § 407.

12 Discussed *ante*, § 206.

§ 383. **Purchases and sales of married women.**—Generally speaking, a married woman cannot contract to buy or sell property,<sup>1</sup> because a contract to buy is a mere personal contract,<sup>2</sup> and a contract to sell is not one of the modes usually specified for the disposition of married women's property.<sup>3</sup> Still, an agreement to sell is a contract with reference to the property, and may be valid as such.<sup>4</sup> But with a married woman's actual purchases and sales it is different. It is not one of her privileges to buy without paying,<sup>5</sup> and therefore where she may acquire by purchase,<sup>6</sup> she may buy on credit, and be bound for the purchase money.<sup>7</sup> A promise to pay for separate property is a contract with respect to her separate property.<sup>8</sup> So if she follows

the modes prescribed she may sell her property,<sup>9</sup> and is bound by her acceptance of any consideration,<sup>10</sup> as when in part payment she took the release of a debt of her husband.<sup>11</sup> If her sale is void, and the purchaser has paid her the purchase money, it is generally settled that he must bear the loss;<sup>12</sup> she may recover the property without restoring the purchase money,<sup>13</sup> though in some cases this has been denied.<sup>14</sup>

1 Johnston v. Jones, 12 Mon. B. 326, 329. See Morrison v. Kinstra, 55 Miss. 71, 74; Rose v. Bell, 38 Barb. 25, 27; De Hay v. Dennis, 14 Rich. Eq. 27.

2 Rose v. Bell, 38 Barb. 25, 27. See *ante*, §§ 223, 373, 375, 380.

3 Walker v. Owen, 79 Mo. 264, 268; *post*, § 407.

4 Baker v. Hathway, 5 Allen, 103, 104, 105; Durfee v. McClurg, 6 Mich. 223, 232; Albin v. Lord, 39 N. H. 196, 202.

5 Strong v. Waddell, 56 Ala. 471, 473; *ante*, § 223.

6 Discussed *ante*, §§ 223, 373.

7 Dayton v. Walsh, 47 Wis. 113, 120; 32 Am. Rep. 757; Tiemeyer v. Turnquist, 85 N. Y. 516, 521; 39 Am. Rep. 674; *ante*, §§ 223, 273.

8 Messer v. Smith, 58 N. H. 298, 299; *ante*, § 372.

9 Discussed *ante*, §§ 205, 236; *post*, §§ 304-408.

10 Melley v. Butler, 26 Ohio St. 535, 537; *post*, § 391.

11 Rosenthal v. Mayhugh, 33 Ohio St. 155, 165.

12 Discussed *ante*, § 368; *post*, § 412.

13 Alexander v. Saulsbury, 37 Ala. 375, 378; Wood v. Terry, 30 Ark. 385, 393; Oglesby v. Pasco, 79 Ill. 164, 170; Glidden v. Strupler, 52 Pa. St. 400, 404; McLaurin v. Wilson, 16 S. C. 402, 410; *post*, § 415.

14 Pilcher v. Smith, 2 Head, 208, 211; *post*, § 415.

§ 384. Covenants and bonds of married women. — Generally a married woman's seal adds nothing to the validity of her contract, it does not, for example, estop her as to the consideration.<sup>1</sup> Her covenants, like her simple contracts, were void at common law;<sup>2</sup> no judgment or damages could be recovered on them at law,<sup>3</sup> nor has any case presented itself in which one of them has been enforced in equity.<sup>4</sup> By statute she is sometimes expressly authorized to covenant, and on such a covenant she is liable at law.<sup>5</sup> But statutes authorizing her to convey, to make deeds, etc., do not render

valid her covenants in such deeds, etc.,<sup>6</sup> so that a warranty deed of a married woman is no better than a quit-claim deed.<sup>7</sup> Still a covenant for title in a deed of her property may be valid as a contract "with respect" thereto;<sup>8</sup> and covenants for purposes immediately connected with the use, etc., of her property may be valid under her implied powers.<sup>9</sup> There are cases in which a married woman has been held estopped by her covenants, though she could not have been held liable in damages for the breach thereof.<sup>10</sup> So her bonds were void;<sup>11</sup> though in equity, one to secure purchase money was held valid as to the property purchased,<sup>12</sup> and one expressly charging her separate property may be valid.<sup>13</sup> Nor can she file a bond in a judicial proceeding<sup>14</sup> unless expressly authorized.<sup>15</sup>

1 Radford v. Carwile, 13 W. Va. 573, 683.

2 Cruzen v. McKaig, 57 Md. 454, 462; Martin v. Dwelly, 6 Wend. 9, 13; 21 Am. Dec. 245; Pilcher v. Smith, 2 Head, 203, 211.

3 Porter v. Bradley, 7 R. I. 538, 542.

4 See Pilcher v. Smith, 2 Head, 203, 211.

5 Worthington v. Cooke, 52 Md. 297, 307.

6 Whitbeck v. Cook, 15 Johns. 483, 490; 8 Am. Dec. 272. S. P., Botsford v. Wilson, 75 Ill. 133, 134; Aldridge v. Burlison, 3 Blackf. 261; Griner v. Butler, 61 Ind. 362, 366; 23 Am. Rep. 675; Nunnall v. White, 3 Met. (Ky.) 584, 593; Preston v. Evans, 56 Md. 476, 491; Botsford v. Pearson, 7 Allen, 504, 505; Hovey v. Smith, 22 Mich. 170, 173; Grout v. Townsend, 2 Hill, 551; Sawyer v. Little, 11 Vt. 414. *Contra*, Nelson v. Harwood, 3 Call, 394; *infra*, n. 10.

7 Botsford v. Wilson, 75 Ill. 133, 134. (By statute.)

8 Richmond v. Tibbles, 26 Iowa, 474, 481; Botsford v. Pearson, 7 Allen, 504, 505; *ante*, § 472. Not a covenant in her husband's deed; Griffin v. Sheffield, 38 Miss. 359, 392.

9 Kolls v. De Leyer, 41 Barb. 208, 211; Houghton v. Milbourne, 54 Wis. 554, 564; *ante*, § 373.

10 Davis v. Tingle, 8 Mon. B. 543; Fowler v. Shearer, 7 Mass. 14, 21; Nash v. Spofford, 10 Met. 192; Calcord v. Swan, 7 Mass. 231; Wadleigh v. Glines, 6 N. H. 17; 23 Am. Dec. 705; Hill v. West, 8 Ohio, 222, 225; Fletcher v. Coleman, 2 Head, 384.

11 Wilson v. Fuller, 60 How. Pr. 480, 481; Huntley v. Whitner, 77 N. C. 392, 393; Schnyder v. Noble, 94 Pa. St. 286, 289.

12 Schnyder v. Noble, 94 Pa. St. 286, 289.

13 Woolsey v. Brown, 11 Hun, 52, 53; *infra*, n. 15.

14 Ward v. Whitney, 12 Phila. 246.

15 Woolsey v. Brown, 74 N. Y. 82, 84; *supra*, n. 13.

§ 385. Promissory notes of married women. — At common law the promissory note of a married woman was void;<sup>1</sup> a mortgage for the sole purpose of securing it was void;<sup>2</sup> if made jointly with another it was void as to her,<sup>3</sup> but valid as to her co-promisor;<sup>4</sup> so as to a surety;<sup>5</sup> it was equally void in the hands of *bona fide* assignees for value without notice;<sup>6</sup> by accepting a note from a married woman purchaser a vendor did not lose his lien.<sup>7</sup> Now a party endeavoring to enforce a promissory note must show that it falls within some equitable or statutory exception;<sup>8</sup> in Michigan, for example, it must be shown that it was for something connected with her separate estate;<sup>9</sup> in Louisiana, that it benefited her.<sup>10</sup> Under an act enabling a married woman to *contract* as if sole, she may make a promissory note,<sup>11</sup> and validly indorse a note of her husband's firm,<sup>12</sup> and execute a note in blank,<sup>13</sup> and be liable, though her husband joined with her and has been adjudged a bankrupt.<sup>14</sup> Under an act enabling her to contract with reference to her separate property, a note with reference to something else is not valid;<sup>15</sup> but a note for repairs on the same is valid.<sup>16</sup> In equity her note might be a charge, as any other promise to pay might.<sup>17</sup> At common law she could in her own name indorse a note drawn to her order, with her husband's consent,<sup>18</sup> and her said indorsement passed a good title;<sup>19</sup> and his said consent could be indirectly proved;<sup>20</sup> but she could not be liable as indorser.<sup>21</sup> Under a statute enabling her to dispose of her separate property jointly with her husband, his joint indorsement of her separate note was not required, but only his consent express or implied.<sup>22</sup> And she can be liable as indorser only when she can be liable as maker.<sup>23</sup> Her acceptance of a bill given for the debt of another is void, where she cannot bind herself for the debt of another.<sup>24</sup>

- 1 *Vance v. Wells*, 6 Ala. 737; *Simpers v. Sloan*, 5 Cal. 457, 458; *Taylor v. Boardman*, 92 Ill. 566, 563; *Jones v. Crosthwaite*, 17 Iowa, 393, 396; *Shannon v. Canney*, 44 N. H. 593, 594; *ante*, § 356.
- 2 *Hodges v. Price*, 19 Fla. 342, 345; *Sperry v. Dickinson*, 82 Ind. 132, 135.
- 3 *Davis v. Foy*, 15 Miss. 64, 67.
- 4 *Robinson*, 11 Bush, 174, 179, 180.
- 5 *Willingham v. Leake*, 7 Baxt. 453, 457.
- 6 *Kenton v. McClellan*, 43 Mich. 564, 565; *Cooley v. Barcroft*, 43 N. J. L. 363, 366.
- 7 *Willingham v. Leake*, 7 Baxt. 453, 457.
- 8 *Buhler v. Jennings*, 49 Mich. 538, 539; *Saratoga v. Pruyn*, 90 N. Y. 250, 256.
- 9 *Buhler v. Jennings*, 49 Mich. 538, 539.
- 10 *Taylor v. Carlisle*, 2 La. An. 579, 580.
- 11 *Messer v. Smyth*, 58 N. H. 298, 299. See *Marlow v. Barlew*, 53 Cal. 456, 459; *Wood v. Oxford*, 52 Cal. 412; *Kenworthy v. Sawyer*, 125 Mass. 28.
- 12 *Kenworthy v. Sawyer*, 125 Mass. 28.
- 13 *Hord v. Taubman*, 79 Mo. 101, 103; *Morrison v. Thistle*, 67 Mo. 596, 600.
- 14 *Goodnow v. Hill*, 125 Mass. 587.
- 15 *Kenton v. McClellan*, 43 Mich. 564, 563; *ante*, § 370.
- 16 *Parker v. Kane*, 4 Allen, 343, 347; *ante*, §§ 372, 373.
- 17 *Hord v. Taubman*, 79 Mo. 101, 103; *ante*, §§ 206, 237.
- 18 *Meakens v. Henighe*, 17 Mo. 297, 300.
- 19 *Stevens v. Beals*, 10 Cush. 291, 293.
- 20 *McClain v. Weldemeyer*, 25 Mo. 364, 367.
- 21 *Norris v. Lantz*, 18 Md. 260, 263; *ante*, § 356.
- 22 *Whitridge v. Barry*, 42 Md. 140; *Trader v. Lowe*, 45 Md. 1.
- 23 See *Shannon v. Canney*, 44 N. H. 592, 593.
- 24 *Cooley v. Barcroft*, 43 N. J. L. 363, 366.

§ 386. Releases and receipts of married women.—A release is a contract, and works as an estoppel, while a receipt is a mere statement—a mere admission of payment, and not conclusive. When a married woman is entitled to certain property, her sole receipt therefor, unless impeached, is a perfectly good discharge;<sup>1</sup> the receipt of her husband, except as her agent in fact, being, on the other hand, worthless.<sup>2</sup> But a married woman is not bound by a seal,<sup>3</sup> is not estopped,<sup>4</sup> where she could not contract; and as, if she accepted part of her property for the whole, or something in place of



her legal rights, she would really dispose of such rights in whole or in part, her release is not valid except as a receipt, unless she can contract as if unmarried,<sup>5</sup> or has full power of disposition over the rights released.<sup>6</sup> At common law she could give neither release nor receipt as her legal existence was gone,<sup>7</sup> and her present property rights vested in her husband.<sup>8</sup>

1 See *Gore v. Carl*, 47 Conn. 291, 293; *Windsor v. Bell*, 61 Ga. 671, 674; *Nevins v. Gourley*, 95 Ill. 206, 213; *Trader v. Lowe*, 45 Md. 1; *Read v. Earle*, 12 Gray, 423, 425; *Early v. Rolfe*, 95 Pa. St. 53, 60.

2 *Rieper*, 79 Mo. 352, 453. Consult *ante*, §§ 84-86.

3 *Radford v. Carwile*, 13 W. Va. 573, 583; *ante*, § 384.

4 *Powell*, 98 Pa. St. 403, 413; *post*, §§ 412, 415.

5 Consult *ante*, § 371.

6 Consult *ante*, §§ 205-207, 233-239, 370, 372, 373.

7 *Kelso v. Tabor*, 52 Barb. 125, 128; *ante*, § 357.

8 *Nobley v. Leophart*, 47 Ala. 257, 251. See *Kidwell v. Kirkpatrick*, 70 Mo. 214, 216; *ante*, §§ 141-183.

§ 387. **Married women's contracts for rent, repairs, and family expenses.**—At common law a married woman could, of course, not lease property, and in her leaseholds her husband had very full rights.<sup>1</sup> When she can lease by statute expressly, she is liable for the rent at law.<sup>2</sup> A lease is, in fact, the purchase of a term, and a married woman is liable for the rent just as she would be for purchase money.<sup>3</sup> If she can lease, she is liable on an implied promise for the use and occupation of premises which she holds after the expiration of the lease, and this though her husband and family are living with her.<sup>4</sup> For repairs on her property at common law she was in no way liable,<sup>5</sup> and even for repairs on her equitable separate estate, she was liable only if she made the contract in such a way as to bind her said estate.<sup>6</sup> From her mere knowledge that repairs were being made on her property at her husband's request, no promise on her part to pay therefor can be implied.<sup>7</sup> But when she is collecting the rents

of her separate property, and allows out of them for repairs, she is bound.<sup>8</sup> So a contract for repairs is beneficial to her estate,<sup>9</sup> and is a contract with reference thereto,<sup>10</sup> and is a contract which, owing to her ownership of her separate property, she may by implication make.<sup>11</sup> From a purchase by the wife of family supplies, a promise to pay on the part of the husband and not of the wife is implied.<sup>12</sup> If she expressly contracts to pay therefor, she is liable only if she is liable generally on her contracts,<sup>13</sup> or expressly charges her estate.<sup>14</sup> For a purchase of family necessities is not of itself a contract with reference to her separate estate,<sup>15</sup> nor is it a contract which she can make by virtue of her powers implied from her ownership of her property.<sup>16</sup> In some States her property is made jointly liable with her husband's for all family supplies,<sup>17</sup> but this is a liability of her property and not of herself.<sup>18</sup>

1 Discussed *ante*, § 145.

2 *Cruzen v. McKaig*, 57 Md. 454, 462; *Worthlington v. Cooke*, 52 Md. 297, 303.

3 *Bush v. Babbitt*, 25 Hun, 213, 214; *ante*, §§ 223, 233.

4 *Ackley v. Westervelt*, 83 N. Y. 448, 453.

5 *Crane v. Kelley*, 7 Allen, 250, 251.

6 See *Wilson v. Jones*, 46 Md. 349, 357, 358.

7 *Bickford v. Dane*, 53 N. H. 185, 186.

8 *Cheney v. Pierce*, 38 Vt. 515.

9 See *Batchelder v. Sargent*, 47 N. H. 262, 266.

10 *Vail v. Meyer*, 71 Ind. 159, 164; *ante*, § 372.

11 *Parker v. Kane*, 4 Allen, 346, 347; *ante*, § 373.

12 *Shaw v. Thompson*, 16 Pick. 198, 200.

13 *Yates v. Survey*, 65 Me. 221, 222. See *Cummings v. Miller*, 3 Grant Cas. 146, 147.

14 See *Radford v. Carwile*, 13 W. Va. 573, 661; *ante*, §§ 205, 207, 237.

15 *Schneider v. Garland*, 1 Mackey, 350; *ante*, § 372.

16 *Thomas v. Passage*, 54 Ind. 106, 114; *ante*, § 373.

17 *Childress v. Mann*, 33 Ala. 206, 207; *Van Platen v. Krueger*, 10 Ill. App. 627, 629; *Fitzgerald v. McCarty*, 53 Iowa, 702, 719; *Bergen v. Forsythe*, 17 Mon. B. 551, 555; *Lee v. Morris*, 3 Bush, 210, 211.

18 *Frost v. Parker*, 21 N. W. Rep. 507, 509.

§ 338. **A married woman's submission to arbitration.**—A submission to arbitration is a contract and its validity depends on the capacity of parties to contract;<sup>1</sup> therefore, at common law, a married woman could not be compelled to perform an award.<sup>2</sup> Now, a married woman cannot submit to arbitration any rights which she could not dispose of by such a contract;<sup>3</sup> but she may submit claims arising out of her equitable separate estate;<sup>4</sup> under a power to manage, she may submit a claim arising in the course of management;<sup>5</sup> and under a power to dispose, she may submit any claim to arbitration.<sup>6</sup> Even though she could not be compelled to perform an award, if she has agreed to one, the other party cannot relieve himself of his obligation by alleging her coverture.<sup>7</sup>

1 *Spurck v. Crook*, 19 Ill. 415, 428.

2 *Oglesby v. Pasco*, 79 Ill. 164, 170.

3 *Spurck v. Crook*, 19 Ill. 415, 428; *Palmer v. Davis*, 28 N. Y. 242, 250.

4 *Palmer v. Davis*, 28 N. Y. 242, 250.

5 *Duren v. Getchell*, 55 Me. 241, 248.

6 *Palmer v. Davis*, 28 N. Y. 242, 250.

7 *Palmer v. Davis*, 28 N. Y. 242, 248; *ante*, § 368.

§ 389. **Married women's employment of agents.**—A married woman's capacity to bind herself for the compensation of her agents can hardly be said to be coterminous with her capacity to act by agent.<sup>1</sup> But she can bind her separate estate in equity for such compensation;<sup>2</sup> is bound by contracts for labor, services, etc., "with respect" to her separate estate;<sup>3</sup> and when she has the power to "have and hold her property as if unmarried," has the incidental power to employ agents to attend to it.<sup>4</sup> Her contracts for counsel fees are separately discussed.<sup>5</sup>

1 See discussion *ante*, § 87.

2 *Stevens v. Reed*, 112 Mass. 515, 517; *Owen v. Cawley*, 36 N. Y. 600, 605.

3 *Albin v. Lord*, 39 N. H. 196, 202, *ante*, § 372.

4 *Leonard v. Rogan*, 20 Wis. 340, 342; *ante*, § 373.

5 *Post*, Suits of Married Women, § 463.

§ 390. **Married women as stockholders.**—A married woman's subscription to stock is an executory agreement, and, as such, void at common law;<sup>1</sup> but a note given for stock has been held beneficial to her separate estate, and therefore a charge thereupon;<sup>2</sup> and by statute in some States, she may be a subscriber.<sup>3</sup> When she is holder of stock as her separate property, she is liable for the assessments thereupon as any other person is<sup>4</sup>—the general statutes apply to married women<sup>5</sup>—and her liability is one of principal and not of surety.<sup>6</sup>

1 *Rice v. Columbus*, 32 Ohio St. 380, 385.

2 *Williams v. King*, 43 Conn. 569, 572.

3 *Wells v. Bank*, 24 La. An. 273, 274. See Cal. Civ. Code, §§ 285, 325, 561, 575, 648; *post*, § 481.

4 *Anderson v. Line*, 14 Fed. Rep. 405, 406; *Hobart v. Johnson*, 19 Blatchf. 359, 362; *The Reciprocity Bank*, 22 N. Y. 9, 15.

5 *The Reciprocity Bank*, 22 N. Y. 9, 15; *ante*, § 369.

6 *Hobart v. Johnson*, 19 Blatchf. 359, 362; *post*, § 391.

§ 391. **Married women's contracts as surety.**—At common law a married woman could not be a surety because she could not contract at all.<sup>1</sup> In equity, though in most States a contract made with intent to charge equitable separate property therewith is enforceable, even if made for the benefit of another,<sup>2</sup> in some States such contracts are enforced only if beneficial to the woman or the property, and suretyship contracts are void.<sup>3</sup> But the general rule is that all deeds, mortgages, etc., of a married woman, made in accordance with the law, are valid, no matter whom they benefit,<sup>4</sup> for a general power or enabling act does not limit a married woman to contracts for her benefit.<sup>5</sup> But some statutes expressly except suretyship contracts,<sup>6</sup> and under these a contract of a married woman jointly with

another, for his debt, is void as to her;<sup>7</sup> nor is a contract between her and her husband any consideration in favor of the payee for her indorsement of her husband's note.<sup>8</sup> And a suretyship contract is not a contract "with reference," etc., to her separate property,<sup>9</sup> unless it is charged thereon;<sup>10</sup> nor is it a contract which she is empowered to make by implication from her power to hold, enjoy, etc.<sup>11</sup> Her acceptance of bill of exchange for goods sold another is a suretyship contract;<sup>12</sup> but her liability as stockholder is not the liability of a surety.<sup>13</sup> The rules are the same whether a wife goes surety for her husband or for a stranger,<sup>14</sup> and her liabilities in the former case have already been fully discussed.<sup>15</sup>

1 Schmidt v. Postel, 63 Ill. 59, 60; *ante*, §§ 134, 356.

2 McVey v. Cantrell, 70 N. Y. 295, 297; 26 Am. Rep. 605; *ante*, § 134.

3 Perkins v. Elliott, 23 N. J. Eq. 526, 528, 533; *ante*, §§ 134, 206.

4 Comegys v. Clarke, 44 Md. 108, 111; *ante*, § 134.

5 Hart v. Grigsby, 14 Bush, 542; Mayo v. Hutchinson, 57 Me. 546; Major v. Holmes, 124 Mass. 108, 109; Witte v. Wolfe, 19 S. C. 256, 268, 269; Pelzer v. Campbell, 15 S. C. 581, 601; 40 Am. Rep. 705; *ante*, §§ 134, 372.

6 Ga. Code, 1873, § 1783; *ante*, § 134.

7 Brent v. Mount, 65 Ga. 92, 93.

8 Reed v. Buys, 44 Mich. 80, 82; Richards v. Proper, 44 Mich. 96, 98.

9 Reed v. Buys, 44 Mich. 80, 82; State v. Scott, 10 Neb. 83, 87; *infra*, n. 11; *ante*, § 3.

10 See State v. Scott, 10 Neb. 83, 86; Nunn v. Glvhan, 45 Ala. 370, 375.

11 Russel v. People, 39 Mich. 671, 673; Huyler v. Atwood, 26 N. J. Eq. 504, 506; Kavanaugh v. O'Neill, 53 Wis. 101, 105; *ante*, § 372.

12 Cooley v. Bancroft, 43 N. J. L. 363, 365.

13 Hobart v. Johnson, 19 Blatchf. 359, 362.

14 2 Bish. M. W. § 371.

15 See, therefore, fully, *ante*, § 134.

§ 392. Contracts of married women in course of trade. — When a statute authorizes a married women to trade, she may make all contracts which fall within the usual course of her business.<sup>1</sup>

1 Barton v. Beer, 35 Barb. 78, 80; Wilthaus v. Ludecus, 5 Rich. Eq. 326, 329. Discussed *post*, MARRIED WOMEN TRADERS, § 464-481.

§ 393. **Miscellaneous contracts of married women.**—Special acts in some States authorize special contracts of married women, such as contracts for the insurance of her husband's life,<sup>1</sup> and her property.<sup>2</sup>

<sup>1</sup> Married Woman's Act, 1882, England, ch. 75, § 11; Ala. Code, 1876, § 2333; Del. Rev. 1874, p. 478; N. J. Rev. 1877, p. 640; Vt. R. S. 1880, §§ 2340, 2343, 2345; W. Va. R. S. 1879, ch. 122, §§ 5, 6.

<sup>2</sup> *Bernheim v. Beer*, 56 Miss. 149.

## CHAPTER XXII.

## DEEDS OF MARRIED WOMEN.

- § 394. At common law.
- § 395. Under statutes.
- § 396. Of dower.
- § 397. Of equitable separate property.
- § 398. Of statutory separate property.
- § 399. Joinder of husband.
- § 400. Execution by wife.
- § 401. Certificate of acknowledgment, etc.
- § 402. Confirmation of invalid deed by wife.
- § 403. Confirmation of invalid deed by statute.
- § 404. Confirmation of invalid deed by equity.
- § 405. Impeachment of married women's deeds.
- § 406. Married woman's powers of attorney.
- § 407. Agreements of married women to give deeds.
- § 408. Miscellaneous points as to deeds of married women.

§ 394. **Deeds of married women at common law.**—At common law a married woman had no legal existence and no present property rights,<sup>1</sup> and therefore her deed, whether of dower<sup>2</sup> or of her own property,<sup>3</sup> was, like her other contracts,<sup>4</sup> a mere nullity.<sup>5</sup> She could be barred of her dower or divested of her property only by fine and common recovery.<sup>6</sup> Fines and common recoveries have never existed in this country, and now do not exist anywhere,<sup>7</sup> but statutes have taken their place.<sup>8</sup> In some States, independently of statute, the joint deed of husband and wife has always been recognized as if authorized by the common law.<sup>9</sup> Whenever a wife held the position of an unmarried woman, as when her husband was civilly dead,<sup>10</sup> or had abandoned the realm,<sup>11</sup> or as to her equitable separate property,<sup>12</sup> she could deed her own property as if unmarried.

- 1 Blythe v. Dargain, 68 Ala. 370, 375; *ante*, §§ 184, 331.
- 2 Rannels v. Gehnor, 18 Cent. L. J. 182 (Mo.); *ante*, §§ 270-272.
- 3 Gebb v. Rose, 40 Md. 387, 392; Bagley v. Emberson, 79 Mo. 139, 140; *post*, §§ 402-404.
- 4 *Ante*, §§ 375, 368.
- 5 Gillespie v. Worford, 2 Cold. 632, 638; *post*, §§ 402-404.
- 6 Leonis v. Lazzarovich, 55 Cal. 52, 55; Hartley v. Ferrell, 9 Fla. 374, 378; Bressler v. Kent, 61 Ill. 426, 427; 14 Am. Rep. 67; Lane v. McKeen, 15 Me. 304, 305; Lawrence v. Heister, 3 Har. & J. 371, 377; Helms v. Franciscus, 2 Bland, 544, 563; 20 Am. Dec. 402; Bool v. Mix, 17 Wend. 119, 129; 31 Am. Dec. 285; Martin v. Dwelly, 6 Wend. 9, 12; 21 Am. Dec. 245; Gillespie v. Worford, 2 Cold. 632, 637.
- 7 Lawrence v. Heister, 3 Har. & J. 371, 377; 1 Bish. M. W. § 587.
- 8 Martin v. Dwelly, 6 Wend. 9, 12; 21 Am. Dec. 245; *post*, § 395.
- 9 Manchester v. Hough, 5 Mason, 67, 68, 69; Fowler v. Shearer, 7 Mass. 14; Colcad v. Swan, 7 Mass. 231; Davey v. Turner, 1 Dall. 11, 13, 14, 17; Albany v. Bay, 4 Const. 9.
- 10 See Rhea v. Rhenner, 1 Peters, 105, 107; *ante*, § 358; *infra*, n. 11.
- 11 Danner v. Berthold, 11 Mo. App. 351, 355; Rosenthal v. Mayhugh, 33 Ohio St. 155, 161; *ante*, § 358. But see Rhea v. Rhenner, 1 Peters, 105, 107; Beckman v. Stanley, 8 Nev. 257, 261.
- 12 Miller v. Newton, 23 Cal. 554, 567; *ante*, § 205; *post*, § 397.

§ 395. Deeds of married women under statutes. — Every-where statutes have been passed relating to married women's deeds of dower,<sup>1</sup> of the reversionary interest in her realty,<sup>2</sup> and of her statutory separate estate.<sup>3</sup> These are statutes expressly referring to married women, as the general statutes do not apply to their deeds,<sup>4</sup> unless they deed as if unmarried.<sup>5</sup> The general rule is that a married woman can convey her property, except her equitable separate estate,<sup>6</sup> only in the mode prescribed by statute.<sup>7</sup> The deed must be acknowledged<sup>8</sup> and certified to,<sup>9</sup> substantially as required by the statutes, or it is mere waste paper.<sup>10</sup>

1 Chase, 1 Bland, 206, 228; 17 Am. Dec. 277; *ante*, §§ 270-272; *post*, § 336.

2 Helms v. Franciscus, 2 Bland, 544, 563; 20 Am. Dec. 402; *infra*, n. 7.

3 Edwards v. Schoeneman, 104 Ill. 278, 284; *post*, § 398.

4 See Applegate v. Tracy, 9 Dana, 215, 224; Bell v. Lyle, 10 Lea, 44, 45; *ante*, §§ 13, 363.

5 See Edwards v. Schoeneman, 104 Ill. 278, 283.

6 *Ante*, § 205; *post*, § 397.



7 *Leonis v. Lazzarovich*, 55 Cal. 52, 57; *Lewis v. Waters*, 3 Har. & McH. 430; *Schroyer v. Nickell*, 55 Mo. 264, 267, 268; *Gilchrist v. Borie*, 1 Dev. & B. Eq. 346, 359; *Green v. Branton*, 1 Dev. Eq. 500, 503; *Brown v. Farran*, 3 Ohio, 140, 155; *Rosenthal v. Mayhugh*, 33 Ohio St. 155, 159; *Silliman v. Cummins*, 13 Ohio, 116, 118; *Gillespie v. Worford*, 2 Cold. 632, 638; cases *post*, §§ 404, 406, 407; *ante*, § 236.

8 *Hepburn v. Dubois*, 12 Peters, 345, 374; *post*, § 401.

9 *Lane v. Dolich*, 6 McLean, 200; *post*, § 402.

10 *Leonis v. Lazzarovich*, 55 Cal. 52, 57; *Mariner v. Saunders*, 5 Gilm. 125; *Cross v. Everts*, 28 Tex. 523, 532; *post*, §§ 402-404.

§ 396. **Deeds of married women of dower.**—Dower is not separate property;<sup>1</sup> in fact, it is not property at all during coverture,<sup>2</sup> and a deed of it operates only as a release, and by way of estoppel.<sup>3</sup> This subject has already been fully discussed.<sup>4</sup>

1 *Bressler v. Kent*, 61 Ill. 426, 428; 14 Am. Rep. 67; *ante*, § 270.

2 *Moore v. Mayor*, 8 N. Y. 110, 113; 59 Am. Dec. 473; *ante*, § 262.

3 *Reiff v. Horst*, 55 Md. 42, 47; *ante*, § 272.

4 *Ante*, §§ 270-272.

§ 397. **Deeds of married women of equitable separate property.**—When a married woman has the capacity to deed her equitable separate property she executes the deed, unless the settlement provides otherwise, as if unmarried.<sup>1</sup> As to whether or not she has the capacity there are three rules: (1) That she has the capacity unless the settlement takes it away;<sup>2</sup> (2) that she has not the capacity unless the settlement gives it;<sup>3</sup> and (3) that she has the capacity to deed away her estate during coverture, but not her reversion.<sup>4</sup> This has been fully discussed.<sup>5</sup> Her equitable property which is not separate, she must deed as she does her legal estates of the same kind.<sup>6</sup>

1 *American v. Wadhams*, 10 Barb. 597, 602. S. P., *Essex v. Atkins*, 14 Ves. 542, 547; *Radford v. Carwile*, 13 W. Va. 573, 578; *ante*, §§ 202, 205.

2 *Chew v. Beall*, 13 Md. 348, 360; *ante*, 203-205.

3 *Swift v. Castle*, 23 Ill. 200, 222; *ante*, §§ 203-205.

4 *Radford v. Carwile*, 13 W. Va. 573, 682, 683; *ante*, §§ 203-205.

5 *Ante*, §§ 203-205.

6 *Clayton v. Rose*, 89 N. C. 106, 110; *Young*, 7 Cold. 461, 477; *Hawley v. Troyman*, 29 Gratt. 728, 730.

§ 398. **Deeds of married women of statutory separate property.**—The general rule is that a married woman has no capacity to dispose of her statutory separate lands unless this is expressly given by statute.<sup>1</sup> The power to dispose is not, for example, included within the power to “own, enjoy, and possess, as if unmarried,”<sup>2</sup> and when the capacity is not expressly given her, she must dispose of her statutory separate property in the same way as she would dispose of property held as at common law,<sup>3</sup> and her invalid deed would have no effect.<sup>4</sup> If the statute expressly gives her the power to dispose of her property, but prescribes some particular mode of disposition—some particular formalities—the deed must substantially conform with the requirements of the statute or it will be wholly void.<sup>5</sup> If the statute expressly gives her the power of disposition, but names no particular mode of execution, etc., she may execute her deed as if unmarried, and if it is imperfect, it may be confirmed, and will be valid in equity, just as the imperfect deed of an unmarried woman is.<sup>6</sup>

1 *Swift v. Lucy*, 27 Me. 235, 238; *ante*, § 236.

2 *Parent v. Calleraud*, 64 Ill. 97, 99; *ante*, §§ 236, 373.

3 *Hartley v. Ferrell*, 9 Fla. 374, 378; *Bressler v. Kent*, 61 Ill. 426, 427; 14 Am. Rep. 67; *Scott*, 13 Ind. 225, 227; *Shumaker v. Johnson*, 35 Iowa, 33, 35; *Jewett v. Davis*, 10 Allen, 68, 71; *Young v. Snyder*, 3 Grant, 150, 151.

4 *Rogers v. Higgins*, 48 Ill. 211, 216; *Lucas v. Cobbs*, 1 Dev. & B. 223, 222; *post*, § 404.

5 *Silliman v. Cummins*, 13 Ohio, 116, 118; *ante*, § 395, n. 7.

6 *Edwards v. Schoeneman*, 104 Ill. 278, 284; *Scranton v. Stewart*, 52 Ind. 68, 89; *Silliman v. Cummins*, 13 Ohio, 116, 119; *post*, § 404.

§ 399. **Joinder of husband in deeds of married women.**—The husband's joinder in his wife's deed is generally necessary to render it valid,<sup>1</sup> and is unnecessary only when she is expressly authorized to deed “as if sole,” or “as if unmarried.”<sup>2</sup> At common law he had an

actual estate to convey, and it would seem that he had to join as a co-grantor;<sup>3</sup> but when the whole estate is vested in the wife, and his assent is required to prevent imposition,<sup>4</sup> his mere signature to the deed is enough, and he need not be named in the body of the deed.<sup>5</sup> But his assent cannot be proved by parol,<sup>6</sup> although, where his assent was required in writing, his joinder in a mortgage note was held sufficient, though he did not join in the mortgage at all.<sup>7</sup> The joint deed of husband and wife need not be executed at the same time and place.<sup>8</sup> Whether he shall join is discretionary with him, and he cannot be compelled to join;<sup>9</sup> so it is a personal right and cannot be delegated;<sup>10</sup> nor can he honestly claim compensation for joining.<sup>11</sup> His joinder is not necessary in his wife's deed of her equitable separate estate,<sup>12</sup> when she has the power to convey as if sole,<sup>13</sup> nor need he join in her deed executed under a special power.<sup>14</sup> Where, by statute, a husband must join in his wife's deeds, she cannot without him make a deed good in equity,<sup>15</sup> or a good agreement to convey.<sup>16</sup>

1 *Alexander v. Saulsbury*, 37 Ala. 375, 377; *Hartley v. Ferrell*, 9 Fla. 374, 373; *Bressler v. Kent*, 61 Ill. 426, 427; 14 Am. Rep. 67; *Scott*, 13 Ind. 225, 227; *Shumaker v. Johnson*, 35 Iowa, 33, 35; *Jewett v. Davis*, 10 Allen, 63, 71; *Townsley v. Chapin*, 12 Allen, 476, 579; *Buchanan v. Hazzard*, 95 Pa. St. 240, 243; *Young v. Snyder*, 3 Grant, 150, 151.

2 *Rake v. Lawshee*, 24 N. J. L. 613, 616; 1 Bish. M. W. § 593.

3 See *Blythe v. Dargain*, 63 Ala. 370, 375; *ante*, §§ 147, 153.

4 *Douglas v. Fulda*, 50 Cal. 76, 80; *Meagher v. Thompson*, 49 Cal. 189, 191; *Friedenwaldt v. Mullen*, 10 Heisk. 226, 231.

5 *Pease v. Bridge*, 49 Conn. 58, 61; *Evans v. Summerlin*, 19 Fla. 853, 851; *Chapman v. Miller*, 123 Mass. 261, 271; *Hills v. Bearse*, 9 Allen, 403, 406; *Stone v. Montgomery*, 35 Miss. 83, 107; *Elliott v. Sleeper*, 2 N. H. 525, 529; *Woodward v. Seaver*, 38 N. H. 29, 31; *Burnes v. Haybarger*, 8 Jones, 76, 81; *Friedenwaldt v. Mullen*, 10 Heisk. 220, 231.

6 *Buchanan v. Hazzard*, 95 Pa. St. 240, 243.

7 *Cormerhais v. Wesselhoeft*, 114 Mass. 550, 552.

8 *Ludlow v. O'Neill*, 20 Ohio St. 181, 183; *post*, § 402.

9 *Stevens v. Parish*, 20 Ind. 230, 263.

- 10 Meagher v. Thompson, 49 Cal. 189, 191.
- 11 Beaudry v. Felch, 47 Cal. 183, 185. See Mahoney v. Mackubin, 54 Md. 261.
- 12 Burnett v. Hawpe, 25 Gratt. 481, 487; *ante*, §§ 202-205.
- 13 See Edwards v. Schoeneman, 104 Ill. 278, 284; *ante*, § 371.
- 14 Thompson v. Murray, 2 Hill Ch. 204, 211; *ante*, §§ 202, 205, 211.
- 15 Stevens v. Parish, 29 Ind. 260, 263; Miller v. Wetherby, 12 Iowa, 415, 421; Williamson, 18 Mon. B. 329, 385; Armstrong v. Ross, 20 N. J. Eq. 100, 120; *post*, § 404.
- 16 Townsley v. Chapin, 12 Allen, 476, 479.

‡ 400. **The execution of married women's deeds.** — When a married woman executes a deed under a power, she cannot execute it in blank, because she cannot execute it through an agent.<sup>1</sup> For the same reason she would not be bound by another's signing her name in her presence.<sup>2</sup> In many States, though not in as many as formerly, the statutes provide that in executing her deed a married woman shall be examined apart from her husband, and having had the nature of the deed explained to her, acknowledge that she executes it freely, and not through threats or persuadings of her husband.<sup>3</sup> This was required when a fine was levied at common law.<sup>4</sup> In other States she may execute her deed as if sole.<sup>5</sup> Whether a private acknowledgment is required or not, when a deed is executed under a power which prescribes some acknowledgment, such acknowledgment as is prescribed is a necessary part of the deed:<sup>6</sup> that is to say, a deed without such an acknowledgment would not be valid for any purpose because not a perfect execution of the power.<sup>7</sup> But if a married woman has full power to dispose of her property, and no acknowledgment is named by the statute, her making or omitting an acknowledgment has precisely the same effect in fitting the deed for record, or rendering it valid only as between the parties and in equity, as it would have had had she been unmarried.<sup>8</sup> So where a privy examination is necessary, it is an

essential part of the execution of the deed,<sup>9</sup> and the omission thereof is fatal.<sup>10</sup> An examination apart means an examination out of the presence of her husband, so that he cannot communicate with her by word, look, or motion.<sup>11</sup> It has been held that a privy examination means an examination not only out of the presence of the husband, but out of the presence of any one but the officer,<sup>12</sup> but this decision is probably not sound.<sup>13</sup> The husband and wife need not acknowledge at the same time.<sup>14</sup> A magistrate who is interested in the transfer is not competent to take the acknowledgment;<sup>15</sup> but his relationship to one of the parties is no disqualification, his certification not being a judicial act.<sup>16</sup>

1 Drury v. Foster, 2 Wall. 24, 33; Iford v. Taubman, 79 Mo. 101, 104; *ante*, § 364.

2 Reasoning in cases *supra*, n. 1.

3 See fully 2 Scribner Dow. ch. 13.

4 2 Scribner Dow. p. 321.

5 See Ind. R. S. 1881, § 2938; Iowa R. S. 1880, § 1935; Md. R. C. 1878, p. 483, § 30; Wis. R. S. 1878, § 2221.

6 Cross v. Everts, 28 Tex. 532; *post*, § 404.

7 Silliman v. Cummins, 13 Ohio, 116, 119.

8 Edwards v. Schoeneman, 104 Ill. 278, 284; Scranton v. Stewart, 52 Ind. 63, 89; Silliman v. Cummins, 13 Ohio, 116, 119.

9 Pratt v. Battles, 28 Vt. 685, 689; 2 Scribner Dow. ch. 13.

10 Hepburn v. Dubois, 12 Peters, 345, 374; *post*, § 404.

11 Belo v. Mayes, 79 Mo. 67, 70.

12 Sibley v. Johnson, 1 Mich. 380, 384.

13 See Belo v. Mayes, 79 Mo. 67, 70; Jones v. Maffet, 5 Serg. & R. 523, 524; Coombes v. Thomas, 57 Tex. 321, 323.

14 Newell v. Anderson, 7 Ohio St. 12, 16. Compare Adams v. Buford, 6 Dana, 406, 408.

15 Brown v. Moore, 38 Tex. 645, 648. S. P., Bank v. Conway, 14 Bank Reg. 513; Dussaume v. Burnett, 5 Clarke, 95; Grosbeck v. Seeley, 13 Mich. 330; Withers v. Baird, 7 Watts, 227; Scanlan v. Turner, 1 Bail. 421.

16 Lynch v. Livingston, 2 Seld. 422, 434.

§ 401. The certificate of acknowledgment. — The certificate is the legal evidence of the execution of the deed;<sup>1</sup> and it must show that everything has been done which

is necessary to the validity of a married woman's deed.<sup>2</sup> When a privy examination is required the certificate must show that a privy examination has been had ;<sup>3</sup> an ordinary certificate such as is used for a person *sui juris* will not suffice,<sup>4</sup> nor will a certificate that the acknowledgment was "in due form";<sup>5</sup> when the law requires an acknowledgment "out of the hearing" of the husband, a certificate of an acknowledgment "apart" from the husband is not sufficient;<sup>6</sup> so the omission of "known to me" is fatal;<sup>7</sup> so, of "for the consideration and purposes therein set forth";<sup>8</sup> so, of "that it was explained to the wife."<sup>9</sup> Still the exact words of the statute need not be used.<sup>10</sup> Thus, "freely and of her own accord" is equivalent to "freely as her voluntary act and deed."<sup>11</sup> If the certificate states that she acknowledged the deed as a release of dower, when in fact it was a deed of her own property, and these words are meaningless, the insertion of them does not destroy the effect of the acknowledgment.<sup>12</sup> The certificate is *prima facie* evidence of all that it states;<sup>13</sup> it is not conclusive as against the wife, and she may show that in fact there was no privy examination,<sup>14</sup> except, perhaps, when the grantee was no party to, and had no notice of, the fraud.<sup>15</sup> But if the certificate is insufficient it cannot be helped by parol proof,<sup>16</sup> or reformed in equity,<sup>17</sup> except where this is expressly authorized by statute, as in California.<sup>18</sup> And without a proper certificate the deed is absolutely void,<sup>19</sup> unless the facts not certified to were not essential to its validity.<sup>20</sup>

1 Young v. Duvall, 100 U. S. 573, 577; *infra*, n. 13.

2 Gill v. Fauntleroy, 8 Mon. B. 177, 178, 180, 182, 183. S. P., Toulmin v. Heidelberg, 32 Miss. 268; Bagby v. Emberson, 79 Mo. 139; Brownder, 14 Ohio St. 589; Mullins v. Weaver, 57 Tex. 5, 6.

3 Belo v. Mayes, 70 Mo. 67, 70. S. P., Flanagan v. Young, 3 Har. & McH. 38; Howell v. Ashmore, 22 N. J. L. 251, 264; Jourdan, 9 Serg. & R. 268; 11 Am. Dec. 724.

4 McLaurin v. Wilson, 16 S. C. 402, 403.

- 5 Lucas v. Cobb, 1 Dev. & B. 228, 233.
- 6 Butterfield v. Beale, 3 Ind. 203, 207.
- 7 Cove v. Cather, 23 Ill. 634, 641; O'Ferrall v. Simplot, 4 Greene 162, 163. Compare Bell v. Lyle, 10 Lea, 44, 45.
- 8 Jacoway v. Gault, 20 Ark. 190, 194.
- 9 Bolling v. Teel, 76 Va. 487, 494; Chauven v. Wagner, 18 Mo. 521; Garrett v. Moss, 22 Ill. 563. Compare Belo v. Mayes, 79 Mo. 67, 71.
- 10 Muir v. Gallaway, 61 Cal. 498, 502. S. P., Batten v. Bigelow, 1 Peters C. C. 452; Tubbs v. Gatewood, 26 Ark. 128; Calumet v. Russell, 68 Ill. 426; Gill v. Fauntleroy, 8 Mon. B. 177, 180-183; Gregory v. Ford, 5 Mon. B. 471, 481; Hollingsworth v. McDonald, 2 Har. & J. 230; 3 Am. Dec. 545; Belo v. Mayes, 79 Mo. 67, 70; Love v. Taylor, 26 Miss. 567; Sharp v. Hamilton, 12 N. J. L. 109; Merriam v. Harsen, 2 Barb. Ch. 232; Brown v. Farran, 3 Ohio, 140, 155; Churchill v. Monroe, 1 R. I. 203.
- 11 Dundas v. Hitchcock, 12 How. 256.
- 12 Evans v. Summerlin, 19 Fla. 858, 863; Hills v. Bearse, 9 Allen, 403, 406; Delossers v. Paston, 19 Mo. 425; Stone v. Montgomery, 35 Miss. 83, 107. Compare *ante*, § 272.
- 13 Young v. Duvall, 109 U. S. 573, 577. S. P., Carpenter v. Dexter, 8 Wall. 513; Rhoades v. Selin, 4 Wash. C. C. 714; Smith v. McGuire, 67 Ala. 34, 37; Barnet v. Pranskauer, 62 Ala. 486; Blackman v. Hawks, 89 Ill. 512; Licknow v. Harding, 65 Ill. 505; Merriek v. Wallace, 19 Ill. 486; Tracy v. Jenks, 15 Pick. 465; Thompson v. Morgan, 6 Minn. 295; Thurman v. Cameron, 24 Wend. 87; Heeter v. Glasgow, 89 Pa. St. 79; *infra*, notes 14, 15.
- 14 Jackson v. Hayner, 12 Johns. 469, 472. S. P., Russell v. Baptist, 73 Ill. 337; Eyster v. Hathaway, 50 Ill. 521; Ford v. Teal, 7 Bush, 156; Central v. Copeland, 18 Md. 305; Fisher v. Meisler, 24 Mich. 447; Martin v. Halley, 61 Mo. 196; Marsh v. Mitchell, 26 N. J. Eq. 497; Priest v. Cummings, 16 Wend. 617, 631; *post*, § 405.
- 15 Davis v. Kennedy, 58 Tex. 516, 519. See Drury v. Foster, 2 Wall. 24, 34; O'Ferrall v. Simplot, 4 Iowa, 281; Dodge v. Hollinshead, 6 Minn. 25; Stone v. Montgomery, 35 Miss. 83; Williams v. Robson, 6 Ohio St. 510, 515; Baldwin v. Snowden, 11 Ohio St. 203; Shrader v. Decker, 9 Pa. St. 14; Hays, 5 Rich. 31; Hartley v. Frost, 6 Tex. 208; Harkins v. Forsythe, 11 Leigh, 294; *post*, § 405.
- 16 Jourdan, 9 Serg. & R. 268, 274; 11 Am. Dec. 724. S. P., Elliott v. Piersol, 1 McLean, 11; 1 Peters, 328; Pendleton v. Bulton, 3 Conn. 406, 412; Hayden v. Westcott, 11 Conn. 129; Martin v. Hargardine, 46 Ill. 322, 325; O'Ferrall v. Simplot, 4 Iowa, 381; Blackburn v. Pennington, 8 Mon. B. 217; Adams v. Buford, 6 Dana, 406, 408; Ridgely v. Howard, 3 Har. & Mell. 321; Silliman v. Cummins, 13 Ohio, 116, 118; Smith v. Hunt, 13 Ohio, 260, 268; 42 Am. Dec. 201; Harty v. Ladd, 3 Oreg. 353; Watson v. Bailey, 1 Binn. 470; 2 Am. Dec. 462; Barnet, 15 Serg. & R. 729; 16 Am. Dec. 516.
- 17 Barnett v. Shackelford, 6 Marsh. J. J. 532, 534; 22 Am. Dec. 100. S. P., Lindley v. Smith, 58 Ill. 250; Blackburn v. Pennington, 8 Mon. B. 217; Wannell v. Kern, 51 Mo. 150; Silliman v. Cummins, 13 Ohio, 116, 119; *post*, § 404.
- 18 Hutchinson v. Ainsworth, 63 Cal. 286, 288.
- 19 Smith v. McGuire, 67 Ala. 34, 37; Leonis v. Mazzarovich, 55 Cal. 52, 56; generally cases cited in this section.
- 20 Scranton v. Stewart, 52 Ind. 63, 90; *ante*, § 400.

§ 402. Confirmation of deeds of married women by act of party.—If a married woman's deed is imperfectly executed, it is usually utterly void,<sup>1</sup> and cannot, therefore, be ratified by her;<sup>2</sup> her subsequent assent to it,<sup>3</sup> during<sup>4</sup> or after coverture,<sup>5</sup> or her parol adoption of it,<sup>6</sup> or her declarations of her willingness to do everything necessary to make it valid,<sup>7</sup> give it no validity. To give it effect it must be re-acknowledged and delivered<sup>8</sup>—it must be made a new deed<sup>9</sup>—and in such case it does not relate back, but takes effect only from the date of such re-acknowledgment and delivery;<sup>10</sup> and so it is defeated by an intermediate valid deed of the same property.<sup>11</sup> As even when a joint deed of husband and wife is required, they need not both execute it at the same time,<sup>12</sup> and a married woman may re-acknowledge and record a deed which she has previously defectively executed.<sup>13</sup> Such new execution may be made during coverture,<sup>14</sup> or after the husband's death;<sup>15</sup> and though no act *in pais* during coverture will estop her from setting up the invalidity of her deed,<sup>16</sup> she may be estopped by acts after the dissolution of the marriage, as by the acceptance of the purchase money.<sup>17</sup> After her own death there can be no valid delivery of her deed.<sup>18</sup> In cases where the deed, though defective, is executed by her while acting with the powers of a *femme sole*, it is not wholly invalid, and may therefore be confirmed.<sup>19</sup>

1 Lucas v. Cobbs, 1 Dev. & B. 228, 232; *ante*, § 363.

2 Buchanan v. Hazzard, 95 Pa. St. 240, 243; *ante*, §§ 366, 368.

3 Miller v. Shackelford, 3 Dana, 289, 297.

4 Adams v. Buford, 6 Dana, 406, 408; Watson v. Bailey, 1 Binn. 470; 2 Am. Dec. 462.

5 Price v. Hart, 29 Mo. 171, 172.

6 Price v. Hart, 29 Mo. 171, 172; *ante*, § 363.

7 Adams v. Buford, 6 Dana, 406, 408.

8 Smith v. Shackelford, 9 Dana, 452, 476; Boatman v. Curry, 25 Mo. 433; Doe v. Howland, 8 Cowen, 277, 284; 18 Am. Dec. 445; Newell



*v. Anderson*, 7 Ohio St. 12, 16; *Jourdan*, 9 Serg. & R. 268, 276; 11 Am. Dec. 724.

9 *Miller v. Shackelford*, 3 Dana, 289, 297.

10 *Doe v. Howland*, 8 Cowen, 277, 284; 18 Am. Dec. 445; *Buchanan v. Hazzard*, 95 Pa. St. 240, 243.

11 *Jackson v. Stevens*, 16 Johns. 110, 114.

12 *Newell v. Anderson*, 7 Ohio St. 12, 16; *ante*, § 271.

13 *Doe v. Howland*, 8 Cowen, 277, 284; 18 Am. Dec. 445; *supra*, n. 8.

14 *Newell v. Anderson*, 7 Ohio St. 12, 16.

15 *Doe v. Howland*, 8 Cowen, 277, 284; 18 Am. Dec. 445.

16 *Miller v. Shackelford*, 3 Dana, 289, 297; *post*, §

17 *Price v. Hart*, 29 Mo. 171, 173. See *Evans*, 3 Yeates, 507, 508; *ante*, § 276; *post*,

18 *Shoenberger v. Hackman*, 37 Pa. St. 87; *Shoenberger v. Zook*, 34 Pa. St. 24.

19 See *Spafford v. Warren*, 47 Iowa, 47, 51; *ante*, §§ 366, 400.

§ 403. **Confirmation of deeds of married women by curative statutes.**—As a general rule, statutes curing the defects in deeds of married women are void;<sup>1</sup> but as already shown, in some States they have been held valid,<sup>2</sup> especially where the State Constitution authorized them.<sup>3</sup> There seems to be no reason why a statute should be able to cure a defect which neither the parties nor a court of equity could remedy.<sup>4</sup>

1 *Loomis v. Brush*, 36 Mich. 40, 47; *ante*, § 23.

2 *Randall v. Kruger*, 23 Wall. 137, 149; *ante*, § 23.

3 *Goshorn v. Purcell*, 17 Ohio St. 641, 646; 49 Am. Dec. 448; *Smith v. Turpin*, 20 Ohio St. 478, 491.

4 *Silliman v. Cummins*, 13 Ohio, 116, 119.

§ 404. **Confirmation of deeds of married women by courts of equity.**—Although it lies within the ordinary jurisdiction of courts of equity to carry out the intentions of parties, and to correct, reform, and compel a re-execution of an imperfect deed,<sup>1</sup> this jurisdiction is founded, not on the validity of the deed as a deed, but on the evidence which it gives of a contract between the parties, on its validity as a contract to give a deed.<sup>2</sup> This jurisdiction depends, therefore, on the capacity of the parties to contract to give and take a deed,<sup>3</sup> and as

married women have usually no general capacity to contract,<sup>4</sup> and as a contract to execute a statutory power could not be specifically enforced,<sup>5</sup> courts of equity have not been in the habit of reforming or giving effect to the imperfect deeds of married women.<sup>6</sup> Generally a married woman's deed invalid at law is equally invalid in equity.<sup>7</sup> When she can convey only under a power which prescribes a certain mode, if that mode is not pursued the power is no more executed in equity than at law, and if equity enforced the deed it would give the grantor an additional power.<sup>8</sup> But where the grantor has the powers of a *femme sole* to convey, independently of the mode followed, equity will reform a defect, and compel a conveyance in accordance with the intentions of the parties.<sup>9</sup> And as a deed of property is a contract with reference thereto,<sup>10</sup> wherever such contracts are valid,<sup>11</sup> although the grantee may perhaps not have a specific performance of an imperfect deed,<sup>12</sup> he may probably enforce it as a contract against the property, and recover any purchase money paid thereupon.<sup>13</sup> For the reasons above given, equity will not prevent a woman from setting up the validity of a deed which in equity and good conscience she ought to recognize, in cases where it would not confirm it;<sup>14</sup> though there are a few cases where equity has upheld the deed of a married woman to prevent great injustice.<sup>15</sup>

1 Simpson v. Montgomery, 25 Ark. 365, 373; Shroyer v. Nickell, 55 Mo. 264, 267.

2 Gebb v. Rose, 40 Md. 387, 392; Carr v. Williams, 10 Ohio, 305, 310.

3 Shroyer v. Nickell, 55 Mo. 264, 267.

4 Discussed *ante*, §§ 355-393.

5 See McBryde v. Wilkinson, 29 Ala. 662; Wilks v. Burns, 60 Md. 64, 71.

6 Holland v. Moon, 39 Ark. 120, 124; *ante*, § 359.

7 Williams v. Walker, Law R. 9 Q. B. D. 576, 581; Drury v. Foster, 2 Wall. 24, 31; Holland v. Moon, 39 Ark. 120, 124; Stidman v. Matthews, 29 Ark. 650, 653, 662; Simpson v. Montgomery, 25 Ark. 365, 373;

Leonis *v.* Lazzarovich, 55 Cal. 52, 55; Atwater *v.* Buckingham, 5 Day, 492, 497; Breit *v.* Yeaton, 101 Ill. 242, 262; Patterson *v.* Lawrence, 90 Ill. 174, 180; 32 Am. Dec. 22; Lindley *v.* Smith, 58 Ill. 250; Martin *v.* Hargardiae, 46 Ill. 422, 425; Rogers *v.* Higgins, 48 Ill. 211, 216; Stevens *v.* Parish, 29 Ind. 260, 263; Grapengether *v.* Fejervary, 9 Iowa, 163, 173; Blackburn *v.* Pennington, 8 Mon. B. 217; Johns *v.* Reardon, 11 Md. 465, 469, 470; Gebb *v.* Rose, 40 Md. 387, 394; Townsley *v.* Chapin, 12 Allen, 476, 479; Shroyer *v.* Nickell, 55 Mo. 264, 267; Bagby *v.* Emberson, 79 Mo. 139, 140; Hord *v.* Taubman, 79 Mo. 101, 104; White, 16 N. J. L. 202, 214; Marvin *v.* Smith, 46 N. Y. 571, 574; Wiswall *v.* Hall, 3 Paige, 313, 317; Knowles *v.* McCauly, 10 Paige, 342, 347; Green *v.* Branton, 1 Dev. Eq. 500, 503; Purcell *v.* Goshorn, 17 Ohio, 105, 124; 49 Am. Dec. 448; Davenport *v.* Savil, 6 Ohio St. 559, 566; Carr *v.* Williams, 10 Ohio, 305, 310; 36 Am. Dec. 87; Roseburgh *v.* Sterling, 27 Pa. St. 292, 293; Wright *v.* Dufield, 53 Tex. 218, 221; Cross *v.* Everts, 23 Tex. 528, 532; *ante*, § 359.

8 See Leonis *v.* Lazzarovich, 55 Cal. 52, 55, 58; *supra*, n. 7.

9 Edwards *v.* Schoeneman, 104 Ill. 278, 284; Silliman *v.* Cummins, 13 Ohio, 116, 119. See Scranton *v.* Stewart, 52 Ind. 68, 89; Styers *v.* Robbins, 76 Ind. 547; Wedel *v.* Herman, 59 Cal. 507.

10 See Richmond *v.* Tibbles, 26 Iowa, 474, 476; Bosford *v.* Pearson, 7 Allen, 504, 505; *ante*, § 372.

11 See *ante*, §§ 206, 238, 372.

12 Wright *v.* Dufield, 53 Tenn. 218, 221; *post*, § 407.

13 Felke *v.* Tighe, 39 Ark. 357, 363. See Shroyer *v.* Nickell, 55 Mo. 264, 269; Danner *v.* Berthold, 11 Mo. App. 351, 363; *post*, § 407.

14 Drury *v.* Foster, 2 Wall. 24, 34; Alexander *v.* Saulsbury, 37 Ala. 375, 378; Leonis *v.* Lazzarovich, 55 Cal. 52, 55; Oglesby *v.* Pasco, 79 Ill. 164, 170; Danner *v.* Berthold, 11 Mo. App. 351, 358; Glidden *v.* Strupler, 52 Pa. St. 400, 401; McLaurin *v.* Wilson, 16 S. C. 402, 410; *post*, § 412.

15 See Cahill *v.* Martin, 7 Law Rec. 361, 379; Lawrence, 63 Cal. 129, 135; 36 Am. Rep. 762; Patterson *v.* Lawrence, 90 Ill. 174, 179; 32 Am. Dec. 22; Richardson *v.* Simmons, 47 Mo. 20, 27; Glass *v.* Warwick, 40 Pa. St. 140, 145.

§ 405. **Impeachment of married women's deeds.**—Although the deed of a married woman be perfect on its face, she may show that in fact it was obtained by fraud,<sup>1</sup> or duress,<sup>2</sup> or was improperly executed,<sup>3</sup> and that it is therefore void.<sup>4</sup> As to her right to do this as against a party to the fraud,<sup>5</sup> or any party with notice of the defect or fraud,<sup>6</sup> or with notice of such facts as should have put him on his guard,<sup>7</sup> or on whose behalf the husband has perpetrated a fraud,<sup>8</sup> there is no doubt; and if she in fact never executed the deed, and it is a forgery, she may impeach it as against any one;<sup>9</sup> but if, though she executed the deed improperly, the certificate is perfect, she cannot, it

seems, impeach it as against purchasers without notice,<sup>10</sup> it being a general rule, founded on public policy, that defects of execution cannot be alleged against *bona fide* purchasers or assignees for value if the certificate be perfect;<sup>11</sup> as to them, in such cases, the certificate is conclusive.<sup>12</sup> The officer who made the certificate cannot impeach the same,<sup>13</sup> nor will the unsupported testimony of the wife be sufficient to overcome the certificate.<sup>14</sup> If she acknowledged the signature, she cannot say she did not sign the deed;<sup>15</sup> nor can she allege that she did not read or understand the deed if she had full opportunities for so doing, and alleges no fraudulent concealment;<sup>16</sup> nor can she deny that she assented when she silently did so;<sup>17</sup> her declarations made at the time of the execution are evidence as part of the *res gestæ*.<sup>18</sup> If she has duly executed the deed, and has left it with her husband, she cannot deny his authority to deliver it<sup>19</sup> (but the delivery must be made before her death<sup>20</sup>). She cannot be estopped from impeaching her deed by her assent thereto during coverture,<sup>21</sup> or by her mere delivery thereof,<sup>22</sup> or even by her retention of the purchase money;<sup>23</sup> she cannot do indirectly by matter *in pais* what she can do directly only by deed duly acknowledged and recorded.<sup>24</sup> As to conveyances to her husband, owing to their relation, he is treated much as he would be were he her trustee, and must show good faith throughout.<sup>25</sup>

1 Williams v. Robson, 6 Ohio St. 510, 515; Cridge v. Hare, 93 Pa. St. 561, 565.

2 Whitridge v. Barry, 42 Md. 140, 153; Eadie v. Slimmon, 26 N. Y. 9, 13; Loudon v. Blythe, 16 Pa. St. 532, 540; 27 Pa. St. 22, 25.

3 Marsh v. Mitchell, 26 N. J. Eq. 497, 499; *ante*, § 401.

4 Allen v. Lenoir, 53 Miss. 321, 331; *ante*, §§ 400, 401.

5 See Davis v. Kennedy, 58 Tex. 516, 519; *ante*, §§ 84, 110.

6 Eyster v. Hathaway, 50 Ill. 521, 524; Ford v. Teal, 7 Bush, 156; Marsh v. Mitchell, 26 N. J. Eq. 497, 499; Shrader v. Decker, 9 Pa. St. 14, 16; 2 Scribner Dow. pp. 370-376.

7 Loudon v. Blythe, 27 Pa. St. 22, 25.

- 8 *Central v. Copeland*, 18 Md. 305, 318; *ante*, §§ 84, 110.
- 9 *Allen v. Lenoir*, 53 Miss. 321, 331. See *Drury v. Foster*, 2 Wall. 24, 24; *Burns v. Lynde*, 6 Allen, 305, 312; *Johnston v. Wallace*, 53 Miss. 331, 335, 338; 24 Am. Dec. 699; *Conover v. Porter*, 14 Ohio St. 450.
- 10 *Johnston v. Wallace*, 53 Miss. 331, 336, 337; 24 Am. Dec. 699; *infra*, n. 11.
- 11 *De Arnaz v. Escandon*, 59 Cal. 436, 480; *Kerr v. Russell*, 69 Ill. 666, 670; 18 Am. Rep. 33; *Johnston v. Wallace*, 53 Miss. 331, 337; 24 Am. Dec. 699; *Baldwin v. Snowden*, 11 Ohio St. 203, 212; *Hill v. Patterson*, 51 Pa. St. 289, 290; *Shrader v. Decker*, 9 Pa. St. 14, 16; *Louden v. Blythe*, 27 Pa. St. 22, 25; *Davis v. Kennedy*, 58 Tex. 516, 519; *Harkins v. Forsythe*, 11 Leigh, 294, 304.
- 12 *Johnston v. Wallace*, 53 Miss. 331, 337; 24 Am. Dec. 699; *supra*, n. 11; *ante*, § 401.
- 13 *Central v. Copeland*, 18 Md. 305, 318; *Johnston v. Wallace*, 53 Miss. 331, 335; 24 Am. Dec. 699; *Harkins v. Forsythe*, 11 Leigh, 294, 304. But see *Louden v. Blythe*, 16 Pa. St. 532, 542.
- 14 *Kerr v. Russell*, 69 Ill. 666, 669, 671; 18 Am. Rep. 33.
- 15 *Kerr v. Russell*, 69 Ill. 663, 673; 18 Am. Rep. 33.
- 16 *Comegys v. Clarke*, 44 Md. 108, 110, 111; *Fowler v. Trull*, 1 Hun, 409, 411; *Walter v. Weaver*, 57 Tex. 569, 571.
- 17 *Rexford*, 7 Lans. 6, 9.
- 18 *Louden v. Blythe*, 16 Pa. St. 532, 542.
- 19 *Ackert v. Pultz*, 7 Barb. 386, 388; *Baldwin v. Snowden*, 11 Ohio St. 203, 213.
- 20 *Shoenberger v. Hackman*, 37 Pa. St. 87, 94; *ante*, § 402.
- 21 *Ladd v. Hilderbrant*, 27 Wis. 135, 144; 9 Am. Rep. 445; *ante*, § 402.
- 22 See *Kerr v. Russell*, 69 Ill. 666, 663; 18 Am. Rep. 33; *ante*, §§ 400, 401.
- 23 *Oglesby v. Pasco*, 79 Ill. 164, 170; *ante*, § 402; *post*, §§ 412, 415.
- 24 *Leonis v. Lazzarovich*, 55 Cal. 52, 53; *supra*, n. 23.
- 25 *Witbeck*, 25 Mich. 439, 442; *ante*, § 110.

§ 406. Married women's powers of attorney.—Independently of express statute, a married woman may, where she has over her equitable separate property the powers of a *femme sole*,<sup>1</sup> convey it by power of attorney;<sup>2</sup> but she cannot through an attorney execute even a private power,<sup>3</sup> or release her dower,<sup>4</sup> or convey her property held as at common law,<sup>5</sup> unless, as to the last, owing to her husband's civil death, etc., she has the capacities of a *femme sole*.<sup>6</sup> In some States powers of attorney are expressly regulated by statute;<sup>7</sup> but whether a married woman is ever authorized by implication to convey through an attorney is not settled,<sup>8</sup> and

the difficult question relating to this subject is, whether under the statutes authorizing her to convey her statutory separate property she may convey by attorney.<sup>9</sup> It seems plain that she cannot, if a privy examination is required, for this must accompany the conveyance itself;<sup>10</sup> but where she may convey as if sole, there seems no reason why she cannot convey by attorney,<sup>11</sup> provided that her husband join in executing the power, if his joinder is required in her deed.<sup>12</sup> Of course any power of attorney to be valid must be executed with all the formalities required with the act which it authorizes.<sup>13</sup> As to powers of attorney, unconnected with the conveyance of land, they gain no validity by the seal and acknowledgment,<sup>14</sup> and their validity is tested as that of other contracts of married women is.<sup>15</sup> At common law a married woman's antenuptial power of attorney was revoked by her marriage.<sup>16</sup>

1 Discussed *ante*, § 205.

2 Because she can convey as a *femme sole*.

3 *Hord v. Taubman*, 79 Mo. 101, 104.

4 *Lewis v. Cox*, 5 Har. (Del.) 401, 402; *ante*, § 271.

5 *Heywood v. Shreve*, 44 N. J. L. 94, 95, 96. See *Kenrick v. Wood*, Law R. 9 Eq. 333, 337; *Holladay v. Daily*, 19 Wall. 606, 607; *Hooper v. Smith*, 23 Ala. 633, 642; *Holland v. Moon*, 39 Ark. 120, 125; *Lewis v. Cox*, 5 Har. (Del.) 401, 402; *Mott v. Smith*, 16 Cal. 533, 556, 557; *Douglas v. Fulda*, 50 Cal. 76, 79; *Dawson v. Shirley*, 6 Blackf. 531, 532; *Patton v. Stewart*, 19 Ind. 233, 237; *Wilkinson v. Gettys*, 13 Iowa, 157, 158; *Steele v. Lewis*, 1 Mon. 98, 99; *Chew v. Bank*, 14 Md. 319; *Turton*, 6 Md. 383; *Hall v. Callahan*, 66 Mo. 316, 324; *Bocock v. Pavey*, 8 Ohio St. 270, 278; *Caldwell v. Walters*, 18 Pa. St. 79, 82; 55 Am. Dec. 592; *Gillespie v. Worford*, 2 Cold. 632, 638; *Patton v. King*, 26 Tex. 685; *Shanks v. Lancaster*, 5 Gratt. 119, 113; 59 Am. Dec. 103; *Sumner v. Conant*, 10 Vt. 9, 20.

6 *Wright v. Blackwood*, 57 Tex. 644, 648.

7 See *Drury v. Foster*, 2 Wall. 24, 33; *Douglas v. Fulda*, 50 Cal. 183, 191; *Butterfield v. Beall*, 3 Ind. 203, 207; *Cumming v. Williamson*, 1 Sand. Ch. 17, 24; R. L. R. S. 1882, p. 423; W. Va. R. S. 1878, ch. 65, § 12. Her power of attorney to sell to pay husband's debt is void under statute prohibiting her suretyship contracts: *Veal v. Hunt*, 63 Ga. 723, 731.

8 *Holladay v. Daily*, 19 Wall. 606, 607, 610.

9 See cases *supra*, n. 5; *infra*, notes 10-13.

10 *Holland v. Moon*, 39 Ark. 120, 125; *McDaniel v. Grace*, 15 Ark. 465; *Mott v. Smith*, 16 Cal. 533, 556, 557; *Gillespie v. Worford*, 2 Col. 632, 638; *supra*, n. 5.

11 See *Vail v. Meyer*, 71 Ind. 159, 165; *Bickford v. Dane*, 58 N. H. 185, 186; *ante*, § 364.

12 See *Holland v. Moon*, 39 Ark. 120, 126; *infra*, n. 13.

13 *Holland v. Moon*, 39 Ark. 120, 126; *Butterfield v. Beall*, 3 Ind. 203, 207; *Steele v. Lewis*, 1 Mon. 48, 49; *Bocock v. Pavay*, 8 Ohio St. 270, 278.

14 Consult *ante*, § 384.

15 See *Heywood v. Shreve*, 44 N. J. L. 94, 95, 96.

16 *Montague v. Carneal*, 1 Marsh. A. K. 351, 352.

§ 407. **Agreements of married women to give deeds or to convey.**—It is commonly said that a wife's executory contract to make a deed of property is absolutely void,<sup>1</sup> and even her contract to deed property held by her as trustee has been so held.<sup>2</sup> When she is under her common-law disabilities and can therefore make no contract,<sup>3</sup> she cannot, under statutes authorizing her release of dower,<sup>4</sup> or her conveyance of her common-law property by deed jointly with her husband and privily acknowledged,<sup>5</sup> make an oral contract to give a deed,<sup>6</sup> or one in which her husband does not join,<sup>7</sup> or one in which he joins but which is not acknowledged;<sup>8</sup> and it seems equally settled that such statutes invest her simply with statutory powers, which must be strictly executed,<sup>9</sup> and that an agreement to convey is not in itself a conveyance,<sup>10</sup> and therefore not an execution of such powers, though executed with all the formalities required by such statutes for a conveyance;<sup>11</sup> and that such agreements cannot be enforced even in equity,<sup>12</sup> because equity will not reform, correct, or complete the execution of a statutory power.<sup>13</sup> A married woman who holds her equitable separate property with the powers of a *femme sole* can agree to convey it,<sup>14</sup> but her husband must join with her if the settlement so provides;<sup>15</sup> and as to such property her imperfect mortgage is treated as an agreement to give a mortgage, and is enforced as a charge.<sup>16</sup> How far she can agree to convey her statutory separate estate is doubtful, when she

has neither the general ownership thereof, nor the general power to convey it as if sole, but a particular mode for its conveyance is provided by statute; it is certain that she cannot bind herself under such statutes for its future conveyance by an agreement not executed according to the statute,<sup>17</sup> and whether she can by one executed according to the statute is disputed.<sup>18</sup> The true rule seems to be that when a privy acknowledgment is necessary, an agreement to convey, though executed with such acknowledgment, could not be enforced,<sup>19</sup> for a contrary rule would lead to the absurdity of a married woman being *compelled* to execute a deed, and to acknowledge that she executed it *freely* and of her own accord;<sup>20</sup> but when she can convey as a *femme sole*, even though it be provided that her husband shall join,<sup>21</sup> there is no reason why her agreement to convey should not be enforced as the agreement of a *femme sole* would be.<sup>22</sup> When she has full ownership of her property,<sup>23</sup> or may contract generally as a *femme sole*,<sup>24</sup> her agreement to convey is valid. When her contracts with reference to her separate estate are valid, an agreement to convey or an imperfectly executed deed should be valid as such.<sup>25</sup> Whenever her contract is valid she can be compelled to specifically enforce it,<sup>26</sup> though if this would require her privy acknowledgment a different rule might apply;<sup>27</sup> but there are some cases where, though the right to specific performance has been denied, her land has been held responsible for any money paid on account of,<sup>28</sup> or expended on the faith of,<sup>29</sup> the contract. At common law the husband could not by his agreement to convey affect the wife's interest in her lands,<sup>30</sup> though such an agreement bound him.<sup>31</sup>

1. *Miller v. Albertson*, 73 Ind. 343, 345; *Shroyer v. Nickell*, 55 Mo. 264, 268; *Wright v. Dufield*, 55 Tenn. 213, 221; cases generally in this section; *ante*, § 380.



- 2 Avery v. Griffin, Law R. 6 Eq. 603, 609; *post*, § 485.
- 3 Norris v. Lantz, 18 Md. 260, 269; *ante*, § 359.
- 4 King v. Barnes, 5 Ala. 610, 614; Butler v. Buckingham, 5 Day, 492, 497; 5 Am. Dec. 174; Watrous v. Chalker, 7 Conn. 224, 228; *ante*, § 267. This is questioned in Dreutzer v. Lawrence, 53 Wis. 594, 598.
- 5 Williams v. Walker, Law R. 9 Q. B. D. 576, 581; Watrous v. Chalker, 7 Conn. 224, 228; Stevens v. Parish, 23 Ind. 260, 263; Thames, 3 Me. 50, 51; Lane v. McKeen, 15 Me. 304, 305; Steffey, 19 Md. 5, 12, 13; Pentz v. Simonson, 13 N. J. Eq. 232, 234; Martin v. Dwelly, 6 Wend. 9, 12; 21 Am. Dec. 245; Andriot v. Lawrence, 33 Barb. 142, 143; Todd v. Pitts, 10 Ohio St. 514, 526; Dankel v. Hunter, 61 Pa. St. 382, 384.
- 6 Dankel v. Hunter, 61 Pa. St. 382, 384; *supra*, n. 5.
- 7 Behler v. Weyburn, 59 Ind. 143, 145; Gebb v. Rose, 40 Md. 510, 520; Townsley v. Chapin, 12 Allen, 476, 478; Kingsley v. Gilman, 15 Minn. 59, 61; Huff v. Price, 50 Mo. 228, 229; *ante*, § 399.
- 8 Leonis v. Lazzarovich, 55 Cal. 52, 56; Watrous v. Chalker, 7 Conn. 224, 228; Lane v. McKeen, 15 Me. 304, 305; Pentz v. Simonson, 13 N. J. Eq. 232, 234; *ante*, §§ 400, 401.
- 9 Leonis v. Lazzarovich, 55 Cal. 52, 57; Gillespie v. Worford, 2 Cold, 632, 638; *ante*, § 404.
- 10 See Felkne v. Tighe, 39 Ark. 357, 362.
- 11 See Felkne v. Tighe, 39 Ark. 357, 362; Wood v. Terry, 30 Ark. 335, 391; Stedham v. Matthews, 29 Ark. 650, 658.
- 12 Stedham v. Matthews, 29 Ark. 650, 658; Wills v. Galtman, 53 Miss. 722, 732; Hawley v. Twyman, 29 Gratt. 728, 730; *ante*, § 404.
- 13 Bright v. Boyd, 1 Story, 478, 487; McBride v. Wilkinson, 29 Ala. 662, 667; Ellet v. Wade, 47 Ala. 456, 464; Moreau v. Detcheniendy, 18 Mo. 522, 531; Silliman v. Cummins, 13 Ohio, 116, 118. *Contra*, Clayton v. Frazier, 33 Tex. 91, 100. Otherwise as to private powers: 2 Wash. Real Prop. 300, *et seq.*; Waterman, Spec. Perf. § 387.
- 14 Stead v. Nelson, 2 Beav. 245, 248; Wainwright v. Hardesty, 2 Beav. 363, 365; Felkne v. Tighe, 39 Ark. 357, 369; Butler v. Buckingham, 5 Day, 492, 497; 5 Am. Dec. 174; Pilcher v. Smith, 2 Head, 208, 211.
- 15 Gelston v. Frazier, 26 Md. 329, 344; *supra*, n. 7.
- 16 See Hall v. Eccleston, 27 Md. 510, 520; Whitely v. Stewart, 63 Mo. 360, 363; *infra*, n. 23.
- 17 Shroyer v. Nickell, 55 Mo. 264, 268; *supra*, notes 5-8.
- 18 *Pro*, Dankel v. Hunter, 61 Pa. St. 382, 384. *Contra*, Stedham v. Matthews, 29 Ark. 650, 658; *supra*, notes 9-13.
- 19 Stedham v. Matthews, 29 Ark. 650, 658; *supra*, n. 11.
- 20 See Leonis v. Lazzarovich, 55 Cal. 52, 53; Love v. Watkins, 40 Cal. 547, 559; 6 Am. Rep. 624.
- 21 Kingsley v. Gilman, 15 Minn. 59, 61. See Hall v. Eccleston, 37 Md. 510, 520; *supra*, n. 7.
- 22 See Dreutzer v. Lawrence, 53 Wis. 594, 598, 599.
- 23 Brown, 94 Pa. St. 362, 367; Dreutzer v. Lawrence, 53 Wis. 594, 598, 599.
- 24 Love v. Watkins, 40 Cal. 547, 559; 6 Am. Rep. 624; Spafford v. Warren, 47 Iowa, 47, 51.
- 25 Baker v. Hathway, 5 Allen, 103, 105. Husband may have to join; Behler v. Weyburn, 59 Ind. 143, 145; *supra*, n. 7.

26 *Love v. Watkins*, 40 Cal. 547, 559; 6 Am. Rep. 624; *Baker v. Hathway*, 5 Allen, 103, 105; *Kingsley v. Gilman*, 15 Minn. 59, 61.

27 *Leonis v. Lazzarovich*, 55 Cal. 52, 58; *supra*, n. 20.

28 *Felkne v. Tighe*, 39 Ark. 357, 363; *Shroyer v. Nickell*, 55 Mo. 264, 269; *Martin v. Dwelly*, 6 Wend. 9, 12; 21 Am. Dec. 245; *Rosenthal v. Mayhugh*, 33 Ohio St. 155, 165; *Warner v. Sickles*, Wright, 81, 82; *Pilcher v. Smith*, 2 Head, 208, 211.

29 *Shroyer v. Nickell*, 55 Mo. 264, 268.

30 *Tevis v. Richardson*, 7 Mon. 654, 659; *Weed v. Terry*, 2 Doug. (Mich.) 344; 45 Am. Dec. 257; *Williams v. Christie*, 4 Duer, 29.

31 *Steffey*, 19 Md. 5, 12; *post*, § 407.

§ 408. *Miscellaneous points as to deeds of married women.*—A joint deed of husband and wife is binding on the husband though invalid as to the wife.<sup>1</sup> A deed from a married woman to her husband may be invalid, though it would have been valid if executed to a stranger in the same way.<sup>2</sup> The alteration of a married woman's deed by the grantee is fatal to its validity.<sup>3</sup> When she may "deed" she may make any deed, absolute or conditional,<sup>4</sup> of gift or of purchase.<sup>5</sup>

1 *Gill v. Fauntleroy*, 8 Mon. B. 177, 182; *Central v. Copeland*, 18 Md. 305, 320; *Johns v. Reardon*, 11 Md. 465; *Hoover v. Wells*, 33 Miss. 536; *Beal v. Harmon*, 38 Mo. 435; *Curtiss v. Follett*, 15 Barb. 337; *Newcomb v. Smith*, Wright, 203.

2 *Preston v. Fryer*, 38 Md. 221, 225; *ante*, §§ 42, 43.

3 *Hord v. Taubman*, 79 Mo. 101, 103.

4 *Smith v. Wilson*, 2 Met. (Ky.) 235, 237.

5 *Comegys v. Clarke*, 44 Md. 108, 111; *McFerrin v. White*, 6 Cold. 493.

## CHAPTER XXIII.

## ESTOPPELS AGAINST MARRIED WOMEN.

- § 409. Estoppels divided.
- § 410. Estoppels against married women — General rules.
- § 411. Estoppels by record against married women.
- § 412. Estoppels by deed against married women.
- § 413. Estoppels *in pais* defined.
- § 414. Estoppels *in pais* against married women — General rule.
- § 415. Estoppels *in pais* — Contracts.
- § 416. Estoppels *in pais* — False representations.
- § 417. Estoppels *in pais* — Silence, acquiescence.
- § 418. Estoppels *in pais* — Pure torts.
- § 419. Effect of participation of husband.
- § 420. Estoppels after dissolution of marriage.

§ 409. **Estoppels divided.** — Estoppels are of three kinds:<sup>1</sup> (1) Estoppels of record, consisting mainly of judgments, the material contents of which parties and privies cannot dispute — are estopped from disputing — such matters being *res adjudicata*. (2) Of deed, consisting mainly of statements in deeds or instruments under seal, which the parties to such deeds or instruments are not allowed to deny. (3) *In pais*, consisting of statements or representations by words or conduct made by one person to another and relied on by that other, so that it would damage that other for such person to deny them, which such person is not allowed to deny.

1 See Bigelow Estoppel, Introduction ; *post*, §§ 410-420.

§ 410. **Estoppels against married women — General rules.** — In accordance with section 409, one may be estopped by a judgment, by a deed, by a contract, or by a tort ; and the general rule as to married women is that they can be estopped only by valid judgments<sup>1</sup> or deeds ;<sup>2</sup> by contracts only so far as they have the capacity to

contract;<sup>3</sup> and only by torts of a kind for which they would be liable.<sup>4</sup> It is clear that a married woman under disabilities cannot be estopped just as if she were *sui juris*,<sup>5</sup> and the only way of determining in what cases she may be estopped is to ascertain, first, whether the alleged estoppel grows out of a judgment, deed, contract, or tort; and second, whether such judgment, deed, contract, or tort is binding as such on the married woman. To illustrate: A judgment is obtained against a married woman on a void note; she moves to have it set aside, alleging her coverture and its consequent invalidity; it is a general principle that when a person applies to have a judgment set aside he cannot allege any ground which he might have alleged in the suit as a defense; it is held that this rule does not apply to married women, because the judgment is invalid.<sup>6</sup> Again, a married woman makes a deed of certain property, and the deed being imperfectly executed is utterly void; but after receiving the purchase money she sues the grantee in ejectment; *held*, she is not estopped from setting up her title, because the deed is invalid.<sup>7</sup> A married woman, by a valid instrument, assigns a mortgage to her husband in blank; she is estopped from denying his right to pledge it, because the assignment is valid.<sup>8</sup> A married woman stands by and sees the public use a part of her property as a road; she is not estopped from closing the road up, because there is no contract or tort, and she can dispose of her property only in the way prescribed by statute.<sup>9</sup> A married woman allows her husband to collect her rents several times; she is thereby estopped from subsequently denying his authority to do so, because she can collect her rents herself, and may do this by agent, and by her conduct has constituted her husband her agent.<sup>10</sup> A married woman, by representing that she

is unmarried, secures credit; she is not estopped from setting up her coverture as a defense, when sued on this debt, for though she has committed a fraud, it is one connected with her contract, and one, therefore, for which she would not be liable.<sup>11</sup> But when a married woman represented that certain property of hers belonged to her husband, for the purpose of deceiving his creditors, she was held estopped from setting up her title to the property as against these creditors, because this fraud was unconnected with any contract of hers, and one for which she might have been sued.<sup>12</sup> Though these cases illustrate the rules, there are many cases which, without any reference to any rules but on general grounds of equity, seem to recognize a far wider liability on the part of married women to be estopped.<sup>13</sup> In the citations under this section the cases are collected.

1 *Griffith v. Clarke*, 18 Md. 437, 464; *Morse v. Toppan*, 3 Gray, 411, 412. See on this point, *Faithorne v. Blaquiere*, 6 Maule & S. 73; *Gambetta v. Broch*, 41 Cal. 72, 82, 83; *Doyle v. Kelly*, 75 Ill. 574; *Elson v. O'Dowd*, 40 Ind. 300, 306; *Van Meter v. Wolfe*, 27 Iowa, 341, 344; 23 Iowa, 397, 404; 19 Iowa, 136; *Goothrie v. Howard*, 32 Iowa, 54, 55; *Spalding v. Wathen*, 7 Bush, 659, 663; *Case v. Ribelin*, 1 Marsh. J. J. 29, 30; *Barnes v. Burbridge*, 15 La. An. 623, 629; *Magruder v. Buck*, 56 Miss. 314, 315; *Green v. Branton*, 1 Dev. Eq. 500, 504; *Hartman v. Ogborn*, 54 Pa. St. 120, 123; *Graham v. Long*, 65 Pa. St. 383, 386; *Caldwell v. Walters*, 18 Pa. St. 79, 83; *Howard v. North*, 5 Tex. 290, 299; *Baxter v. Dear*, 24 Tex. 17, 21; *post*, § 411.

2 *Oglesby v. Pasco*, 79 Ill. 164, 170; *Glidden v. Stampler*, 52 Pa. St. 400, 406. See on this point, *Drury v. Foster*, 2 Wall. 24, 34; *Alexander v. Saulsbury*, 37 Ala. 375, 373; *Wood v. Terry*, 30 Ark. 385, 393; *Morrison v. Wilson*, 13 Cal. 498, 501; *Kerr v. Russell*, 69 Ill. 666, 673; 18 Am. Rep. 634; *Blain v. Harrison*, 11 Ill. 384, 386; *Scranton v. Stewart*, 52 Ind. 63, 94; *Behler v. Weyburn*, 59 Ind. 143, 145; *Patterson v. Frazer*, 5 La. An. 586, 587; *Comegys v. Clarke*, 44 Md. 108, 110, 111; *Lowell v. Daniels*, 2 Gray, 101; *Merriam v. Boston*, 117 Mass. 241, 244; *Nash v. Spofford*, 10 Met. 192; *Norton v. Nichols*, 35 Mich. 148, 150; *Hopper v. Demarest*, 21 N. J. L. 525, 541; *Grant v. Townsend*, 2 Hill, 554, 557; *Green v. Branton*, 1 Dev. Eq. 500, 503; *Dukes v. Spangler*, 35 Ohio St. 119, 127; *Rosenthal v. Mayhugh*, 33 Ohio St. 155, 161, 162; *Todd v. Pittsburgh*, 19 Ohio St. 514, 526; *Rumfeldt v. Clemens*, 46 Pa. St. 455, 457; *Pettit v. Freitz*, 33 Pa. St. 118, 120; *McLaurin v. Wilson*, 16 S. C. 492, 410; *Walter v. Weaver*, 57 Tex. 563, 571; *Radford v. Carwile*, 13 W. Va. 573, 683; *Godfrey v. Thornton*, 46 Wis. 677, 680; *post*, § 412.

3 *Matthews v. Murchison*, 17 Fed. Rep. 760, 766; *Powell*, 98 Pa. St. 403, 413. See on this point, *Schwartz v. Saunders*, 46 Ill. 19, 24; *Spafford v. Warren*, 47 Iowa, 47, 51; *Preston v. Evans*, 56 Md. 476,

491; Dann v. Cudney, 13 Mich. 239, 242, 243; Bodine v. Killeen, 53 N. Y. 93, 96; Nash v. Mitchell, 71 N. Y. 199, 200; 27 Am. Rep. 38; Towles v. Fisher, 77 N. C. 437, 443; Innis v. Templeton, 95 Pa. St. 58, 60; Mason v. Jordan, 13 R. I. 193, 195; *supra*, n. 2; *infra*, n. 4; *post*, §§ 414-417.

4 Oglesby v. Pasco, 79 Ill. 164, 169. On this point, see Jones v. Keaney, 1 Dru. & War. 134, 167; Vaughan v. Vanderstegen, 2 Drew. 363, 379; Wright v. Leonard, 8 Jur. N. S. 415; Cannam v. Farmer, 3 Ex. 698; Adelphi v. Fairhurst, 9 Ex. 422, 429; Lush, Law R. 4 Ch. App. 591, 597; Matthews v. Murchison, 17 Fed. Rep. 760, 766; Moyer v. Adams, 2 Fed. Rep. 182, 187; Bank v. Lee, 13 Peters, 107, 118, 121; Drake v. Glover, 30 Ala. 382, 392; Reis v. Lawrence, 63 Cal. 129, 135; Lathrop v. Soldiers, 45 Ga. 483, 486; Patterson v. Lawrence, 90 Ill. 174, 179; 32 Am. Rep. 22; Leeders v. Allen, 98 Ill. 463, 471; Hackett v. Bailey, 86 Ill. 74, 77; Anderson v. Armistead, 69 Ill. 452, 455; Schwartz v. Saunders, 46 Ill. 18, 24; Wilson v. Loomis, 55 Ill. 352, 357; Catherwood v. Watson, 65 Ind. 576, 580; Summers v. Hoover, 42 Ind. 153, 157; Peck v. Hensley, 21 Ind. 344, 345; Law v. Long, 41 Ind. 586, 596; Gattling v. Rodman, 6 Ind. 289, 293; State v. Holloway, 8 Blackf. 45, 47; Jones v. Brandt, 59 Iowa, 332, 341; Crouse v. Morse, 49 Iowa, 382, 386; Corning v. Fowler, 24 Iowa, 584, 587; Connolly v. Branstier, 3 Bush, 702, 703; Rusk v. Fenton, 14 Bush, 490, 493; Davis v. Tingle, 8 Mon. B. 539, 543; McIntosh v. Smith, 2 La. An. 756, 757; Bancroft v. Curtis, 108 Mass. 47; Lowell v. Daniels, 2 Gray, 161; Dann v. Cudney, 13 Mich. 239, 241; Palmer v. Cross, 1 Smedes & M. 48, 63; Murray v. Fox, 11 Mo. 555, 565; McBeth v. Trabne, 69 Mo. 652, 657; Read v. Hall, 57 N. H. 482, 483; Besson v. Eveland, 26 N. J. Eq. 463, 478; Carpenter, 27 N. J. Eq. 502, 504; 25 N. J. Eq. 194, 201; Syracuse v. Wing, 85 N. Y. 421, 426; Bradstreet v. Pratt, 17 Wend. 44, 46; Ludner v. Sahler, 51 Barb. 322, 324; Dempsey v. Tyler, 3 Duer, 73, 100; Wilson v. Fuller, 60 How. Pr. 480, 481; Towles v. Fisher, 77 N. C. 437, 443; Todd v. Pittsburgh, 19 Ohio St. 514, 523, 526; Early v. Rolfe, 95 Pa. St. 58, 60; Keen v. Hartman, 48 Pa. St. 497, 499; McCullough v. Wilson, 21 Pa. St. 436, 442; McClure v. Douthitt, 6 Pa. St. 414, 417; Mason v. Jordan, 13 R. I. 193, 195; Wilkes v. Kirkpatrick, 1 Humph. 54, 53; Cooley v. Steele, 2 Head, 605, 608; Smith v. Armstrong, 24 Wis. 446, 450; *post*, §§ 416-418.

5 Wood v. Terry, 30 Ark. 389, 393; Glidden v. Strupler, 52 Pa. St. 400, 404, 405. Estopped by acts and declarations in all matters in respect to which she is *ad juris*; Nash v. Mitchell, 71 N. Y. 199, 200; 27 Am. Rep. 38. But see *infra*, n. 13.

6 Griffith v. Clarke, 18 Md. 457, 464. There are cases *contra*, see *post*, § 411.

7 Oglesby v. Pasco, 79 Ill. 164, 170; Rumfeldt v. Clemens, 46 Pa. St. 455, 457. See *post*, § 412.

8 Flanagan v. Hambleton, 54 Md. 222, 232.

9 McBeth v. Trabne, 69 Mo. 642, 657; *post*, § 417.

10 Early v. Rolfe, 95 Pa. St. 58, 60, 61; *post*, §§ 417, 419.

11 Wilson v. Fuller, 60 How. Pr. 480, 481; Keen v. Coleman, 39 Pa. St. 299, 302. There are cases *contra*, see *post*, §§ 416, 418.

12 Oglesby v. Pasco, 79 Ill. 164, 169; *post*, §§ 416-418.

13 See Matthews v. Murchison, 17 Fed. Rep. 760, 766; Reis v. Lawrence, 63 Cal. 129, 135; Patterson v. Lawrence, 90 Ill. 174, 179; 32 Am. Rep. 22; Norton v. Nichols, 35 Mich. 148, 150; Richardson v. Simmons, 47 Mo. 20, 27; O'Brien v. Hilburn, 9 Tex. 297, 299; Godfrey v. Thornton, 46 Wis. 677, 690.

§ 411. Estoppels by record against married women. — As a general rule, a judgment is binding only on the parties to the suit, and on them only if they are competent.<sup>1</sup> A judgment on a contract is in the nature of a contract; it is a specialty and creates a debt; and to have that effect, it must be taken against one capable of contracting a debt.<sup>2</sup> A judgment, accordingly, against a married woman, on her void contract,<sup>3</sup> or warrant of attorney,<sup>4</sup> or by confession when she cannot contract,<sup>5</sup> is void and does not estop her. Such a judgment against a married woman under disability is a manifest error, like a judgment against a dead person.<sup>6</sup> The principle that a party is estopped from alleging, in order to impeach a judgment collaterally, what he alleged or might have alleged as a ground for defense in the suit, does not apply to a case where the defendant was a married woman under disability.<sup>7</sup> But this has been expressly denied,<sup>8</sup> and it has been held that a judgment against a married woman, if fairly obtained, is binding on her,<sup>9</sup> and that she is estopped thereby from setting up in a collateral suit that she was a *femme covert*, whether she had alleged this defense,<sup>10</sup> or had allowed the suit to go by default.<sup>11</sup> In cases where she is sued on a valid cause of action, she is estopped by the judgment as any other person is.<sup>12</sup> And where she is liable with her husband, as on her antenuptial contracts,<sup>13</sup> and on her torts,<sup>14</sup> she is bound thereby,<sup>15</sup> although her husband, having full power to manage the suit, has neglected it,<sup>16</sup> unless he has colluded with the plaintiff,<sup>17</sup> and her property may be seized under such a judgment if entered generally against them both.<sup>18</sup> If her land be seized under a void judgment, she is not estopped from recovering it in ejectment.<sup>19</sup>

1 Bigelow Estoppel, pp. 46-48.

2 *Morse v. Toppan*, 3 Gray, 411; *Barnes v. Burbridge*, 15 La. An. 628.

3 Griffith v. Clarke, 18 Md. 457, 464. See Doyle v. Kelly, 75 Ill. 574; Morse v. Toppan, 3 Gray, 411, 412; Magruder v. Buck, 56 Miss. 314, 315; Corrigan v. Bell, 73 Mo. 53, 57; *ante*, §§ 368, 410.

4 Faithorne v. Blaquiere, 6 Maule & S. 73; Graham v. Long, 65 Pa. St. 383, 386; *ante*, §§ 406, 410.

5 Barnes v. Burbridge, 15 La. An. 623, 629.

6 Spalding v. Wathen, 7 Bush, 659, 663; Case v. Ribelin, 1 Marsh. J. J. 29, 30.

7 Griffith v. Clarke, 18 Md. 457, 464.

8 Elson v. O'Dowd, 40 Ind. 300, 306; Van Meter v. Wolfe, 27 Iowa, 341, 344.

9 Gambetta v. Broch, 41 Cal. 73, 82, 83; Elson v. O'Dowd, 40 Ind. 300, 306; Goothrie v. Howard, 32 Iowa, 54, 55; Van Meter v. Wolfe, 27 Iowa, 341, 344; 23 Iowa, 397, 404; 19 Iowa, 136. See under special act in Penn., Hartman v. Ogborn, 54 Pa. St. 120, 123.

10 Gambetta v. Broch, 41 Cal. 73, 83.

11 Elson v. O'Dowd, 40 Ind. 300, 306.

12 Brown v. Kemper, 27 Md. 666, 673; Baxter v. Dear, 24 Tex. 17, 21; *ante*, § 410.

13 Discussed *ante*, §§ 67, 365.

14 Discussed *ante*, § 66; *post*, § 413.

15 Green v. Branton, 1 Dev. Eq. 500, 504.

16 Green v. Branton, 1 Dev. Eq. 500, 504; *post*, § 461.

17 Green v. Branton, 1 Dev. Eq. 500, 504; *post*, § 461.

18 Howard v. North, 5 Tex. 290, 299; 51 Am. Dec. 769.

19 Caldwell v. Walters, 18 Pa. St. 79, 83; 55 Am. Dec. 592.

§ 412. Estoppels by deed against married women.—A married woman is not estopped by her invalid deed.<sup>1</sup> She may, for example, recover the property conveyed thereby in ejectment, though she has received the purchase money.<sup>2</sup> But where the said purchase money does not vest in the husband, as at common law,<sup>3</sup> but becomes separate property of the wife, the courts have revolted against this rule as most unjust, and have either held her bound to restore the said money,<sup>4</sup> or have charged the same on the property as a debt.<sup>5</sup> If she could be estopped by her invalid deed, she would be able to convey her property without reference to the statutes relating to conveyances of married women,<sup>6</sup> and the said statutes would be in effect repealed.<sup>7</sup> She is not estopped by her seal from showing that the deed



was made without the consideration required by law,<sup>8</sup> or from showing that the deed is void because executed in blank.<sup>9</sup> But she is estopped, it seems, from saying that she did not sign a deed which she has duly acknowledged,<sup>10</sup> or that she did not read<sup>11</sup> or understand<sup>12</sup> it, or did not intend to deliver it when she left it in the hands of her husband and he delivered it.<sup>13</sup> By her deed, voidable on account of infancy, but ratified by receipt of the purchase money during coverture, she is estopped,<sup>14</sup> and so she is by her deed, valid because made after her husband had permanently left her and the State;<sup>15</sup> and when she has validly assigned a mortgage to her husband in blank, she is estopped from denying his right to pledge it.<sup>16</sup> But her valid deed estops her only from denying it to be a conveyance;<sup>17</sup> she is not, unless she can contract independently, estopped by her covenants therein,<sup>18</sup> and may set up an after-acquired title.<sup>19</sup> The effect of her deeds of dower,<sup>20</sup> and her right to impeach her deeds,<sup>21</sup> have already been discussed.

1 *Alexander v. Saulsbury*, 37 Ala. 375, 378; *Wood v. Terry*, 30 Ark. 385, 393; *Morrison v. Wilson*, 13 Cal. 408, 501; *Oglesby v. Pasco*, 79 Ill. 164, 170; *Behler v. Weyburn*, 59 Ind. 143, 145; *Patterson v. Frazer*, 5 La. An. 586, 587; *Lowell v. Daniels*, 2 Gray, 161; *Green v. Branton*, 1 Dev. Eq. 500, 503; *Dukes v. Spangler*, 35 Ohio St. 119, 127; *Todd v. Pittsburgh*, 19 Ohio St. 514, 526; *Glidden v. Strupler*, 52 Pa. St. 400, 406; *Rumfeldt v. Clemens*, 46 Pa. St. 445, 457; *Pettit v. Fretz*, 33 Pa. St. 118, 120; *McLaurin v. Wilson*, 16 S. C. 402, 410; *Wilkes v. Kirkpatrick*, 1 Humph. 54, 58. *Contra*, *Norton v. Nichols*, 35 Mich. 148, 150; *Godfrey v. Thornton*, 46 Wis. 677, 680. See *ante*, §§ 402-405; *post*, § 415.

2 *Oglesby v. Pasco*, 79 Ill. 164, 169; *Glidden v. Strupler*, 52 Pa. St. 400, 406; *supra*, n. 1.

3 As in *Rumfeldt v. Clemens*, 46 Pa. St. 417, 418.

4 *Pilcher v. Smith*, 2 Head, 208, 211; *ante*, § 404.

5 *Shroyer v. Nickell*, 55 Mo. 264, 263; *ante*, § 404. See 8 Am. Law Rev. N. S. 299, 300; article by S. D. Thompson.

6 Discussed *ante*, §§ 395, 400, 401.

7 *Glidden v. Strupler*, 52 Pa. St. 400, 403. See *Morrison v. Wilson*, 13 Cal. 408, 501; *Behler v. Weyburn*, 59 Ind. 143, 145; *Todd v. Pittsburgh*, 19 Ohio St. 514, 526; *Pettit v. Fretz*, 33 Pa. St. 118, 120.

8 *Radford v. Carwile*, 13 W. Va. 573, 683.

H. & W. — 51.

- 9 Drury v. Foster, 2 Wall. 24, 33.
- 10 Kerr v. Russell, 69 Ill. 666, 673 ; 13 Am. Rep. 634 ; *ante*, ‡ 400.
- 11 Comegys v. Clarke, 44 Md. 103, 110, 111 ; Fowler v. Trull, 1 Hun, 409, 411.
- 12 Walter v. Weaver, 57 Tex. 569, 571.
- 13 Ackert v. Pultz, 7 Barb. 336, 333 ; Baldwin v. Snowden, 11 Ohio St. 203, 213.
- 14 Scranton v. Stewart, 52 Ind. 63, 94.
- 15 Reis v. Lawrence, 63 Cal. 129, 135 ; Danner v. Berthold, 11 Mo. App. 351, 355 ; Rosenthal v. Mayhugh, 33 Ohio St. 155, 161, 162 ; *ante*, ‡ 394.
- 16 Flanagan v. Hambleton, 54 Md. 222, 232.
- 17 Preston v. Evans, 56 Md. 476, 491.
- 18 Blain v. Harrison, 11 Ill. 384, 386 ; Shumaker v. Johnson, 35 Ind. 33, 38 ; Preston v. Evans, 56 Md. 476, 491 ; Merriam v. Boston, 117 Mass. 241, 244 ; Nash v. Spofford, 10 Met. 192 ; Hopper v. Demarest, 21 N. J. L. 525, 541 ; Grout v. Townsend, 2 Hill, 554, 557 ; Jackson v. Vanderheyden, 17 Johns. 167 ; 8 Am. Dec. 378 ; Bartlett v. Boyd, 34 Vt. 256, 261 ; *ante*, ‡ 384.
- 19 Blain v. Harrison, 11 Ill. 384, 386 ; Shumaker v. Johnson, 35 Ind. 33, 38 ; Nash v. Spofford, 10 Met. 192
- 20 *Ante*, ‡ 272.
- 21 *Ante*, ‡ 405.

‡ 413. **Estoppels in pais defined.** — An estoppel *in pais* is one which is not created by record or by deed, but which results from a simple contract or tort ; the party who is estopped by an estoppel *in pais* is prevented from bringing evidence to contradict certain representations that he has made by word or conduct ; and these representations may be in the nature of a warranty and contract,<sup>1</sup> or in the nature of a fraud and tort.<sup>2</sup> One is not estopped from denying all his representations, but only those made under certain circumstances. The rule has been laid down as follows : To establish an estoppel *in pais*, it must be shown : First, that the person sought to be estopped has made an admission or done an act with the intention of influencing the conduct of another, or that he had reason to suppose would influence his conduct, inconsistent with the evidence he proposes to give, or the title he proposes to set up. Second, that the other party has acted upon or been influenced by

such act or declaration. Third, that such party will be prejudiced by allowing the truth of the admission to be disproved.<sup>3</sup>

1 See *Curd v. Dodds*, 6 Bush, 681, 685; *post*, §§ 414-419.

2 See *Oglesby v. Pasco*, 79 Ill. 164, 169, 170; *post*, §§ 416-418.

3 *Crouse v. Morse*, 49 Iowa, 382, 337, 338; *Brown*, 35 N. Y. 519, 541.

§ 414. *Estoppels in pais against married women*—*General rule*.—Referring to section 413, a married woman may be estopped *in pais* by a declaration in the nature of a contract or warranty, or in the nature of a fraudulent representation or tort, and she is estopped in one case or the other only when she can render herself liable by such a contract<sup>1</sup> or tort.<sup>2</sup> But the usual requirements to an estoppel in general<sup>3</sup> apply to estoppels against married women, and a married woman is not estopped unless her representation has been relied on,<sup>4</sup> and unless the other party would be injured by her denying it.<sup>5</sup>

1 *Powell*, 98 Pa. St. 403, 413; *ante*, § 410, n. 3; *post*, § 415.

2 *Oglesby v. Pasco*, 79 Ill. 164, 169; *ante*, § 410, n. 4; *post*, § 418.

3 *Crouse v. Morse*, 49 Iowa, 382, 337, 338; *ante*, § 413.

4 *Carpenter*, 27 N. J. Eq. 502, 504.

5 *McGregor v. Sibley*, 69 Pa. St. 383, 394.

§ 415. *Estoppel in pais—By contract*.—A married woman's liability to be estopped by her contracts is coterminous with her capacity to contract;<sup>1</sup> if the contract is valid it estops her; if it is invalid it does not.<sup>2</sup> The contract may be either express or implied, but a contract which she could not expressly make will never be implied against a married woman.<sup>3</sup> How far she is estopped by her deeds has been discussed.<sup>4</sup> Not only does the deed itself, if invalid, not estop her,<sup>5</sup> but her acceptance of the purchase money,<sup>6</sup> and her recognition of the grantee's title,<sup>7</sup> does not estop her, for such conduct could work an estoppel only on the ground of implied contract (the existence of an actual intent to de-

fraud not being considered here<sup>8</sup>), and the law would not imply a contract where she had no capacity to contract, and her deed was therefore void.<sup>9</sup> But her assent or contract will be implied when she could expressly contract,<sup>10</sup> as where she sells a horse which is her separate property, and allows the money to be paid to her husband; in such case she cannot afterwards deny his authority to receive it.<sup>11</sup> When she can contract as if unmarried, she can be estopped as if sole.<sup>12</sup> Whatever she can do herself can estop her if done by her husband with her consent, his agency for her being implied.<sup>13</sup> This is the case when she holds him out as her agent in her separate business.<sup>14</sup> She is estopped by her contract binding on her equitable separate property;<sup>15</sup> when she assents to the sale of her choses in action, she is estopped from applying for her equity of redemption out of them;<sup>16</sup> in equity as to this property she is generally a *femme sole*, and is estopped as such.<sup>17</sup> If she can contract, she can be estopped from denying a party's title to property which she has allowed him to improve under claim of title through her;<sup>18</sup> if she cannot, she is not bound even for improvements put upon her own property with her consent.<sup>19</sup> An apparent exception to the rule laid down in this section is the case where the property of a married woman is sold under void judicial proceedings; in such case, if she has received the purchase money, she is estopped from setting up her title.<sup>20</sup> There is a case in which a married woman was held estopped from claiming her dower by her mere statement made during coverture, at the sale of her husband's land, that she would not claim dower.<sup>21</sup>

1 Danner v. Berthold, 11 Mo. App. 351, 353; Powell, 98 Pa. St. 403, 413; *ante*, ‡ 410.

2 Nash v. Mitchell, 71 N. Y. 199, 200; 27 Am. Rep. 33; Marable v. Jordan, 5 Humph. 417, 418; 42 Am. Dec. 441; *ante*, ‡ 410.

3 *Tucker v. Cocke*, 32 Miss. 184, 190; *Farrar v. Bessey*, 21 Vt. 89, 92; *ante*, § 381.

4 *Ante*, § 412.

5 *Todd v. Pittsburgh*, 19 Ohio St. 514, 523; *ante*, § 412.

6 *Oglesby v. Pasco*, 79 Ill. 164, 169. S. P., *Alexander v. Saulsbury*, 37 Ala. 375, 378; *Green v. Branton*, 1 Dev. Eq. 500, 503; *Rumfeldt v. Clemens*, 46 Pa. St. 455, 457; *Pettit v. Fretz*, 33 Pa. St. 118, 120; *Glidden v. Strupler*, 52 Pa. St. 400, 403, 406; *McLaurin v. Wilson*, 16 S. C. 402, 410. Compare *post*, § 420.

7 *Glidden v. Strupler*, 52 Pa. St. 400, 404.

8 See *post*, §§ 416, 418.

9 See cases *supra*, notes 3-6.

10 *Spafford v. Warren*, 47 Iowa, 47, 51; *ante*, § 381.

11 *Dann v. Cudney*, 13 Mich. 239, 242, 243; *post*, §§ 417, 419.

12 *Nash v. Mitchell*, 71 N. Y. 19, 200; 27 Am. Rep. 38.

13 *Schwartz v. Saunders*, 46 Ill. 18, 24; *Early v. Rolfe*, 55 Pa. St. 58, 60; *ante*, §§ 84, 86; *post*, § 419.

14 *Bodine v. Killeen*, 53 N. Y. 93, 96.

15 See *Drake v. Glover*, 30 Ala. 382, 389; *Wood v. Terry*, 30 Ark. 389, 393; *Schwartz v. Saunders*, 46 Ill. 18, 24; *Dann v. Cudney*, 13 Mich. 239, 242; *Glidden v. Strupler*, 52 Pa. St. 400, 406; *O'Brien v. Hilburn*, 9 Tex. 297, 299.

16 *Lush*, Law R. 4 Ch. App. 591, 602; *Wright v. Arnold*, 14 Mon. B. 638, 642.

17 See *ante*, § 203.

18 *Spafford v. Warren*, 47 Iowa, 47, 51.

19 *Corning v. Fowler*, 24 Iowa, 534, 557; *ante*, § 131.

20 *Shivers v. Simmons*, 54 Miss. 523; 23 Am. Rep. 372; *Smith v. Warden*, 19 Pa. St. 424, 430; *McCullough v. Wilson*, 21 Pa. St. 436; *Freeman Void Judic. Sales*, § 43; 8 Am. Law Rev. N. S. 298, 299.

21 *Connolly v. Branstler*, 3 Bush, 702, 703. But see *ante* §§ 270, 276.

§ 416. *Estoppels in pais against married women—False representations.*—The false representations of a party *sui juris* may affect his rights and obligations either as a contract or as a tort.<sup>1</sup> When one represents that the property he sells is his own, he warrants the title, and if his representation is false he is liable for breach of contract, and is estopped from setting up a better title subsequently acquired.<sup>2</sup> Accompanying such a warranty there may or there may not be a knowledge of the falsity of the statement and an actual intention to deceive. If a representation is made with the intention of deceiving another, and such other is deceived

and acts on the representation, not only may he sue the maker thereof for any damage that results, but such maker cannot set up the falsity of the representation to the other party's damage—he is estopped from alleging his own fraud.<sup>3</sup> In the case of a party under the disability of coverture—a party who at common law is liable for her torts<sup>4</sup> but not on her contracts<sup>5</sup>—it is necessary to determine whether the representation is in the nature of a contract or tort. If there is no guilty knowledge or fraudulent intent, but the representation is a mere agreement or promise that a certain fact is true, and the other party, by acting on this promise to his damage, has paid a consideration therefor, the representation can bind the wife only as a contract, and estop her only if she had the capacity to make such a contract;<sup>6</sup> thus, the covenant of a married woman in her deed, that the title is good, is not binding on her if she has no capacity to contract, and she is not estopped thereby from setting up a subsequent title.<sup>7</sup> If, on the other hand, there is guilty knowledge or fraudulent intent, her representation is a fraud, and she is estopped from denying its truth;<sup>8</sup> thus, where in order to defraud her husband's creditors she represented that property of hers belonged to him, she was estopped from afterwards, as against these creditors, setting up her own title.<sup>9</sup> But if the false representation relates to her capacity to contract, whether made in good faith or with fraudulent intent, she is not estopped thereby;<sup>10</sup> she cannot by her statements give herself a capacity she does not possess<sup>11</sup>—a rule which applies equally to parties under the disability of infancy;<sup>12</sup> thus, she is not estopped by her representations that she is unmarried,<sup>13</sup> or that she has separate property which she can charge,<sup>14</sup> from setting up her coverture when sued on the contract, or from showing that she had no

separate property to charge. This, however, as far as it applies to statements made with the intention to deceive, has been denied in California, Illinois, and New Hampshire.<sup>15</sup> The representation by a *femme sole* that she is married is very different; she is *sui juris*, and is estopped from denying coverture.<sup>16</sup> These representations may be made by conduct as well as by words, and the intent to deceive may be inferred; so that questions not discussed in this section may arise, and must be separately treated.<sup>17</sup>

1 See *Oglesby v. Pasco*, 79 Ill. 164, 169; *Curd v. Dodds*, 6 Bush, 681, 685; *ante*, §§ 410, 413.

2 See *Blain v. Harrison*, 11 Ill. 384, 386; *ante*, § 412.

3 *Hamilton v. Zimmerman*, 5 Sneed, 39, 49; *ante*, § 414.

4 *Vaughan v. Vauderstegen*, 2 Drew. 363, 379; *ante*, § 66; *post*, §§ 418.

5 *Norris v. Lantz*, 18 Md. 260, 263; *ante*, §§ 355-393.

6 Discussed *ante*, § 415.

7 *Preston v. Evans*, 56 Md. 476, 491; *ante*, §§ 384, 412.

8 Discussed *post*, § 418.

9 *Oglesby v. Pasco*, 79 Ill. 164, 169, 170; *post*, § 418.

10 *Keen v. Hartman*, 48 Pa. St. 497, 499. *S. P.*, *Liverpool v. Fairhurst*, 9 Ex. 422, 429; *Cannam v. Farmer*, 3 Ex. 698; *Wright v. Leonard*, 11 Com. B. N. S. 258; *Oglesby v. Pasco*, 79 Ill. 164, 171; *Lowell v. Daniels*, 2 Gray, 161; *Dempsey v. Tyler*, 3 Duer, 73, 100; *Wilson v. Fuller*, 160 How. Pr. 480, 481; *Keen v. Coleman*, 39 Pa. St. 299, 302; *Glidden v. Strupler*, 52 Pa. St. 400, 406; *Mason v. Jordan*, 13 R. I. 193, 195.

11 *Wilson v. Fuller*, 60 How. Pr. 480, 481; *supra*, n. 10.

12 *Brown v. Durham*, 1 Root, 272; *Conroe v. Birdsall*, 1 Johns. Cas. 127; 1 Am. Dec. 105; *Keen v. Hartman*, 48 Pa. St. 497, 499; *Houston v. Turk*, 7 Yerg. 13.

13 *Keen v. Coleman*, 39 Pa. St. 299, 302; *supra*, n. 10.

14 *Patterson v. Frazer*, 5 La. An. 586, 587; *Erwin v. McCalop*, 5 La. An. 173.

15 *Reis v. Lawrence*, 63 Cal. 129, 135; *Patterson v. Lawrence*, 90 Ill. 174, 179; 32 Am. Rep. 22; *Read v. Hall*, 57 N. H. 482, 483.

16 *Mace v. Cadell*, Cowp. 232; *Matthews v. Galindo*, 1 Moore & P. 565; *Langford v. Foot*, 2 Moore & S. 349.

17 *Post*, §§ 417-419.

§ 417. Estoppels in pais against married women — Silence, acquiescence. — Since such estoppels as arise out of a failure to assert a right, or out of silence and acquiescence in the rights claimed by others, arise only

because from such silence and acquiescence a representation is implied,<sup>1</sup> it is clear that a married woman can be bound by her silence and acquiescence only in cases when she would have bound had she expressly made the statement which is implied.<sup>2</sup> Thus, when a married woman makes an invalid deed she is not estopped, by afterwards recognizing its validity and allowing the grantee to improve the property, from asserting her title, for she would not be estopped from by expressly telling the grantee that she would never claim any title thereto;<sup>3</sup> but if she could contract as a *femme sole*, and allowed her grantee to improve property on the faith of a title given him by her, she could not deny the validity of that title.<sup>4</sup> Nor, if she can grant a right of way only in the mode prescribed by statute, can she estop herself from closing up a way by allowing it to be used without complaint.<sup>5</sup> When a party not her husband, in her presence, makes a claim of right inconsistent with her rights, and she allows another to act upon such claim of right without setting up her rights, she is or is not estopped from afterwards setting up her rights, just as she would have been had she expressly said that she had no rights.<sup>6</sup> Thus, when another claims the right to collect money due to her, and such money is paid to him in her presence, she is estopped from denying his right to receive it:<sup>7</sup> she has by her conduct made him her agent.<sup>8</sup> In some cases silence can speak as loudly as words, and when it appears that a married woman was silent with respect to a matter not connected with her contract, knowing her rights, and that her silence was relied on as a disclaimer of right in herself, and an assertion of right in another, her intention to deceive must be implied, and she is bound by her tort just as she would have been had she expressly asserted that the title was



in such other person.<sup>9</sup> The usual case in which these questions arise is where the wife is silent while her husband asserts rights inconsistent with her own.<sup>10</sup>

1 See *Crouse v. Morse*, 49 Iowa, 382, 387, 388; *Brown*, 35 N. Y. 519, 541; *Hamilton v. Zimmerman*, 5 Sneed, 39, 48.

2 See *Marable v. Jordan*, 5 Humph. 417, 418; 42 Am. Dec. 441; *Farrar v. Bessey*, 24 Vt. 89, 92; *ante*, § 415.

3 *Glidden v. Strupler*, 52 Pa. St. 400, 404.

4 *Spafford v. Warren*, 47 Iowa, 47, 51.

5 *McBeth v. Trabue*, 69 Mo. 642, 657; *Todd v. Pittsburgh*, 19 Ohio St. 514, 525, 526.

6 See *Savage v. Foster*, 9 Mod. 35, 37; *Lush*, Law R. 4 Ch. App. 591; *Bank v. Lee*, 13 Peters, 107, 118, 121; *Moyer v. Adams*, 2 Fed. Rep. 182, 187; *Drake v. Glover*, 30 Ala. 382, 390; *Seeders v. Allen*, 98 Ill. 468, 471; *Hackett v. Bailey*, 86 Ill. 74, 77; *Schwartz v. Saunders*, 46 Ill. 18, 24; *Anderson v. Armistead*, 69 Ill. 452, 455; *Wilson v. Loomis*, 55 Ill. 352, 357; *Peck v. Hensley*, 21 Ind. 344, 345; *Catherwood v. Watson*, 65 Ind. 576, 580; *Gatling v. Rodman*, 6 Ind. 289, 293; *State v. Holloway*, 8 Blackf. 45, 47; *Corning v. Fowler*, 24 Iowa, 584, 587; *Crouse v. Morse*, 49 Iowa, 382, 386; *Jones v. Brandt*, 59 Iowa, 332, 341; *Wright v. Arnold*, 14 Mon. B. 638, 642; *Davis v. Tighe*, 8 Mon. B. 539, 543; *Rangely v. Spring*, 21 Me. 130, 138; *Dann v. Cudnev*, 13 Mich. 239, 241; *McBeth v. Trabue*, 69 Mo. 642, 657; *Carpenter*, 27 N. J. Eq. 502, 504; 25 N. J. Eq. 194, 201; *Bradstreet v. Pratt*, 17 Wend. 44, 46; *Todd v. Pittsburgh*, 19 Ohio St. 514, 525; *Early v. Rolfe*, 95 Pa. St. 58, 60; *McClure v. Douthitt*, 6 Pa. St. 414, 417; *Smith v. Armstrong*, 24 Wis. 446, 450.

7 *Early v. Rolfe*, 95 Pa. St. 58, 60, 61.

8 *Dann v. Cudnev*, 13 Mich. 239, 244; *Ludner v. Lahler*, 51 Barb 322, 324; *City v. Raven*, 5 McCord, 465, 469; *ante*, §§ 84, 86.

9 *Oglesby v. Pasco*, 79 Ill. 164, 169; *Davis v. Tingle*, 8 Mon. B. 539, 543; *post*, §§ 418, 419.

10 Discussed *post*, § 419.

§ 418. Estoppels in pais against married women — Pure torts. — Coverture cannot be invoked as a cloak for wrong doing,<sup>1</sup> and so, even at common law, a married woman is liable jointly with her husband for her torts.<sup>2</sup> But as her contracts were void, and as the law could not allow her by her mere statements to give herself capacity, it was held that she was not liable for torts consisting of false and fraudulent representations that she was unmarried and could contract, but only for pure torts.<sup>3</sup> Since an estoppel arising out of tort is founded on the person's liability for the tort,<sup>4</sup> it has been held, generally, that married women are not estopped

by their false and fraudulent representations that they are unmarried, or have property which they can charge by contract; though the contrary rule prevails in California, Illinois, and New Hampshire.<sup>5</sup> But she is estopped by any tort unconnected with her contract,<sup>6</sup> and by her tort connected therewith if the contract is valid.<sup>7</sup> A representation that certain property of hers is her husband's, made for the purpose of deceiving builders, is a pure tort, and estops her;<sup>8</sup> and so are any false and fraudulent representations of this kind.<sup>9</sup> She is estopped by a statement that a bill of exchange has been accepted by her husband, which statement led to the discount of the bill,<sup>10</sup> and by statements made under oath.<sup>11</sup>

1 Rusk v. Fenton, 14 Bush, 490, 493; 23 Am. Rep. 413.

2 Vaughan v. Vanderstegen, 2 Drew. 363, 375; *ante*, § 63; *post*, §§ 421-425.

3 Adelphi v. Fairhurst, 9 Ex. 422, 429; Owens v. Snodgrass, 6 Dana, 229, 230; Keen v. Hartman, 43 Pa. St. 437, 439; *ante*, § 410.

4 *Ante*, §§ 410, 414.

5 Cases cited *ante*, § 416.

6 Wright v. Leonard, 8 Jur. N. S. 415, 416; Jones v. Kearney, 1 Dru. & War. 134, 167; Lush, Law R. 4 Ch. App. 591, 597; Matthews v. Murchison, 17 Fed. Rep. 760, 766; Oglesby v. Pasco, 79 Ill. 164, 169; Davis v. Tingle, 8 Mon. B. 539, 543; Carpenter, 25 N. J. Eq. 194, 201; Fowles v. Fisher, 77 N. C. 437, 443, 444; McCullough v. Wilson, 21 Pa. St. 436, 442; Mason v. Jordan, 13 R. I. 193, 195.

7 See Lathrop v. Soldiers, 45 Ga. 433, 436.

8 Oglesby v. Pasco, 79 Ill. 164, 169; O'Brien v. Hilburn, 9 Tex. 237, 299.

9 See cases cited *supra*, n. 6; *ante*, § 417, n. 6.

10 Wright v. Leonard, 8 Jur. N. S. 415, 416 (divided court).

11 Lathrop v. Soldiers, 45 Ga. 433, 436; Cooley v. Steele, 2 Head, 605, 608.

§ 419. Effect of acts of husband as estoppels against wife.—In considering the effect of a husband's acts and representations as estoppels against his wife, it must be remembered: (1) That at common law the wife was under the control of her husband, and subject to his will;<sup>1</sup> (2) that the husband is in some respects

the agent in law of his wife;<sup>2</sup> and (3) that the husband is very commonly the wife's agent in fact.<sup>3</sup> In the first place, owing to this fiction of coercion, she is *prima facie* not bound by any statement made by her husband *in her presence*;<sup>4</sup> it is presumed that she is silent through fear, and through deference to her husband as her husband;<sup>5</sup> and it must affirmatively appear that she was actuated by other motives—that is to say, that she intended to deceive,<sup>6</sup> or that she voluntarily made her husband her agent and mouthpiece;<sup>7</sup> the question of motive, it seems, being a question of fact for the jury.<sup>8</sup> Since a married woman is liable for a tort committed in her husband's presence only if her active participation therein is affirmatively made to appear,<sup>9</sup> it is clear that she should not be bound by his fraud simply on account of her non-interference.<sup>10</sup> In the second place, leaving out of consideration the question of coercion, she is estopped by her husband's acts only when he is her agent in law or in fact.<sup>11</sup> As to her personalty, if she stands by and allows her husband to sell it, and the purchaser relies on her silence, she is estopped from afterwards setting up her title,<sup>12</sup> because at common law her husband had the right to sell it without her consent,<sup>13</sup> and because, under the statutes, she has usually the right to sell her separate property, and therefore to sell it through an agent, and by her presence and silence she constitutes her husband her agent;<sup>14</sup> and so, at common law, she was estopped from claiming her equity of a settlement out of her choses in action, if she allowed her husband to dispose of them in her presence without making any objection.<sup>15</sup> Thus, she is estopped by her husband's sale of her horse,<sup>16</sup> or of her negroes,<sup>17</sup> or by his collection of her funds,<sup>18</sup> if she was present and made no objection. But owing to the intimacy of the marriage relation, and to the fact

that it is natural and proper that a husband should to some extent possess and manage his wife's property,<sup>19</sup> it is not a fraud on his creditors for his wife merely to allow him to possess and manage her property, and she is not estopped, as a stranger would be, from setting up her title to the same.<sup>20</sup> Her husband's creditors should inquire of her as to her rights, and in such case, if she or her husband, in her presence, should make any false statements, it is clear that this would be a fraud and she would be estopped.<sup>21</sup> There is no reason why a married woman should not lend her property to her husband to use in his business,<sup>22</sup> and no reason why, if she has made no express disclaimer of title, and has not knowingly allowed his creditors to give him credit, supposing her to have no rights,<sup>23</sup> she should be estopped from having back her own. Of course, if she has made him her general agent with respect to property over which she has the rights of a *femme sole*, she is estopped from going behind his acts, so that she cannot claim the repayment of money paid to him as her recognized agent,<sup>24</sup> and if she has put property in his hands to do business with, not as a loan but as capital, she cannot, as against the creditors of that business, claim the property back.<sup>25</sup> With respect to her real estate, different considerations arise: The husband could not dispose of the wife's interest at common law,<sup>26</sup> and even under most modern statutes she can dispose of it only in the mode prescribed by statute;<sup>27</sup> but if she and he join in a contract which is void as to her, he is nevertheless bound,<sup>28</sup> and is estopped thereby; and if he must join with her in order to enable her to set up her rights, the fact that he is estopped may deprive her of her remedy.<sup>29</sup> By allowing him to take the title to her realty in his own name, she estops herself from setting up her title as against *bona fide* pur-

chasers for value,<sup>30</sup> or creditors with a lien,<sup>31</sup> but not from accepting afterwards the legal title, even though the husband is insolvent.<sup>32</sup> When she owns realty or personalty as a *femme sole*, and allows her husband to hold himself out as owner thereof, she is estopped by all his acts with respect thereto.<sup>33</sup>

1 *Scarborough v. Watkins*, 9 Mon. B. 540, 545; 50 Am. Dec. 528; *ante*, §§ 39, 62, 331.

2 *Ante*, §§ 82, 84.

3 *Ante*, §§ 84-88.

4 *Bank v. Lee*, 13 Peters, 107, 118, 121; *Drake v. Glover*, 30 Ala. 382, 390; *Murray v. Fox*, 11 Mo. 555, 565; *Palmer v. Cross*, 1 Smedes & M. 48, 68; *Carpenter*, 27 N. J. Eq. 502, 504.

5 *Drake v. Glover*, 30 Ala. 382, 390; *supra*, n. 4.

6 *Drake v. Glover*, 30 Ala. 382, 391; *O'Brien v. Hilburn*, 9 Tex. 297, 299.

7 See *Dann v. Cudney*, 13 Mich. 239, 241; *ante*, §§ 84, 86.

8 *Early v. Rolfe*, 95 Pa. St. 58, 61; *ante*, § 86.

9 *Ante*, § 66; *post*, § 421.

10 *Carpenter*, 27 N. J. Eq. 502, 504; *supra*, n. 4. But see *State v. Holloway*, 8 Blackf. 45, 47.

11 See *McCaa v. Woolf*, 42 Ala. 389; *Schwartz v. Saunders*, 46 Ill. 18, 24; *Gailing v. Rodman*, 6 Ind. 289, 293; *ante*, § 85.

12 *Drake v. Glover*, 30 Ala. 382, 390; *infra*, notes 14-18.

13 *McCaa v. Woolf*, 42 Ala. 389; *ante*, §§ 163, 170, 176.

14 *Wortman v. Price*, 47 Ill. 22, 24; *Schwartz v. Saunders*, 46 Ill. 18, 24; *Dann v. Cudney*, 13 Mich. 239, 244; *Ludner v. Lahler*, 51 Barb. 322, 324; *City v. Raven*, 5 McCord, 465, 469; *Early v. Rolfe*, 95 Pa. St. 58, 60; *ante*, §§ 84-88.

15 *Lush*, Law R. 4 Ch. App. 591, 597; *Wright v. Arnold*, 14 Mon. B. 633, 642.

16 *Dann v. Cudney*, 13 Mich. 239, 241-243.

17 *O'Brien v. Hilburn*, 9 Tex. 297, 299.

18 *Early v. Rolfe*, 95 Pa. St. 58, 60.

19 Discussed *ante*, §§ 118 a-121.

20 *Jones v. Brandt*, 59 Iowa, 332, 341; *ante*, § 121.

21 See *Oglesby v. Pasco*, 79 Ill. 164, 169; *ante*, §§ 416, 418.

22 See *ante*, §§ 45, 87.

23 See *ante*, §§ 416, 418.

24 *Early v. Rolfe*, 95 Pa. St. 58, 60; *ante*, § 85.

25 *Wilson v. Loomis*, 55 Ill. 352, 357.

26 *Hall v. Callahan*, 66 Mo. 316, 324; *ante*, §§ 85, 143.

27 *Gebb v. Rose*, 40 Md. 387, 392; *ante*, §§ 400, 401, 412.

28 See *ante*, §§ 382, 403.

29 *Huff v. Price*, 50 Mo. 228, 230.

H. & W. — 52.

30 See *Darnaby*, 14 Bush, 485, 488 ; *ante*, § 132.

31 *Besson v. Eveland*, 26 N. J. Eq. 468, 473 ; *Ready v. Bragg*, 1 Head, 511, 515 ; *ante*, § 132.

32 *Summers v. Hoover*, 42 Ind. 153, 157 ; *Bancroft v. Curtis*, 108 Mass. 47, 49 ; *Payne v. Twyman*, 68 Mo. 339, 340 ; *Syracuse v. Wing*, 85 N. Y. 421, 426.

33 See *Anderson v. Armistead*, 69 Ill. 452, 455.

§ 420. **Estoppels against married women arising from acts done after the dissolution of coverture.**—By an act after the dissolution of coverture, a widow may estop herself from setting up the invalidity of an act done during coverture.<sup>1</sup> Thus, if a widow, who has during coverture executed an invalid release of dower, stands by and allows her late husband's property to be sold clear of dower, she is estopped from setting up her right to dower ;<sup>2</sup> so if a widow continues to hold and enjoy the consideration of property disposed of by her during coverture by an invalid instrument, she is estopped from setting up her title to the property so disposed of.<sup>3</sup> But unless there is some new act—some new consideration or deed—a widow is not estopped by acts done during coverture which did not estop her as a married woman.<sup>4</sup>

1 *Hart v. Giles*, 67 Mo. 175, 179 ; *Reed v. Morrison*, 12 Serg. & R. 18, 24 ; *Bullock v. Griffin*, 1 Strob. Eq. 60, 65 ; *ante*, §§ 267, 275, 276.

2 *Hart v. Giles*, 67 Mo. 175, 179.

3 *Bullock v. Griffin*, 1 Strob. Eq. 60, 65.

4 See *ante*, §§ 366, 402.

## CHAPTER XXIV.

## TORTS OF MARRIED WOMEN.

- § 421. General considerations.
- § 422. Antenuptial torts.
- § 423. Postnuptial torts.
- § 424. Torts connected with contract.
- § 425. Liability for, how enforced.

§ 421. General considerations relating to torts of married women.—Wrongs and contract are very differently regarded by the law, and coverture gives a wife no immunity from responsibility for her wrong-doing;<sup>1</sup> whatever immunity she enjoys results, not from the disabilities of coverture, but from the fact that wives are subject to their husbands,<sup>2</sup> and that the law presumes that wrongs done by them in their husbands' presence were done by the command and coercion of the latter.<sup>3</sup> Except when the act is committed in the husband's presence, a wife is as fully responsible for her torts as a *femme sole*,<sup>4</sup> though the procedure against her is, of course, different.<sup>5</sup> As heretofore shown, the husband is liable, as husband or as joint wrong-doer, for all torts of his wife.<sup>6</sup> His liability is co-extensive with hers,<sup>7</sup> and when he is sued as husband with her, he cannot show that he tried to prevent the tort, even in mitigation of damages.<sup>8</sup> But though his liability may cease with the dissolution of coverture, hers does not.<sup>9</sup> His liability is not abolished by implication.<sup>10</sup>

1 Hawk v. Harman, 5 Binn. 43, 45.

2 See *ante*, §§ 30, 62, 419; *post*, § 427; *infra*, n. 3.

3 Zeff v. Jennings, 61 Tex. 453, 471; 1 Bish. M. W. § 703.

4 Discussed *post*, §§ 422-424.

5 Discussed *post*, § 425.

6 Discussed *ante*, § 66.

7 *Austin v. Wilson*, 4 Cush. 273, 275; *Zeliff v. Jennings*, 61 Tex. 458, 471.

8 *Yeates v. Reed*, 4 Blackf. 463, 465.

9 *Kowing v. Manly*, 49 N. Y. 192, 201; 10 Am. Rep. 346.

10 *Zeliff v. Jennings*, 61 Tex. 458, 471; *ante*, § 66.

§ 422. **Antenuptial torts of married women.**—For torts of any kind, except those against the man she marries,<sup>1</sup> committed before marriage, a woman remains liable after her marriage;<sup>2</sup> and her husband is generally liable therefor with her.<sup>3</sup>

1 See *ante*, § 49.

2 *Hawk v. Harman*, 5 Binn. 43, 44; *ante*, § 66.

3 Discussed *ante*, § 66; *post*, 425.

§ 423. **Postnuptial torts of married women.**—For all torts committed by a married woman during coverture, in person, except such as are committed under the coercion of her husband,<sup>2</sup> and such as are intimately connected with her invalid contracts,<sup>3</sup> and such as are committed against her husband,<sup>4</sup> she is liable as fully as if unmarried.<sup>5</sup> Thus, she may be sued, and a judgment obtained may be satisfied out of all her property, for assault and battery,<sup>6</sup> for trespass,<sup>7</sup> for conversion,<sup>8</sup> for slander,<sup>9</sup> for fraud and false and fraudulent representations unconnected with her invalid contracts,<sup>10</sup> for burning property,<sup>11</sup> for poisoning geese,<sup>12</sup> etc. But at common law she could not be held responsible for the act of another as her agent,<sup>13</sup> because she could not contract, and therefore could not appoint an agent;<sup>14</sup> still, so far as she may, under statutes, appoint an agent, or act by agent, she may be responsible for agent's torts.<sup>15</sup> When the act complained of was committed in the presence of her husband, the presumption is that it was committed by her through the authority and coercion of her husband, and that she is not liable at all;<sup>16</sup> but this presumption may be rebutted by



showing that she actively and voluntarily participated in the wrong, and in such case she is as fully responsible as if her husband had been absent.<sup>17</sup>

1 Estill v. Fort, 2 Dana, 237, 238; *infra*, notes 13, 14.

2 Nolan v. Traber, 49 Md. 460, 463; 33 Am. Rep. 277; *infra*, notes 16, 17.

3 Barnes v. Harris, Bush. 15, 16; *post*, § 424.

4 Abbott, 67 Me. 304, 307; 24 Am. Rep. 27; *ante*, § 48.

5 Wright v. Leonard, 11 Com. B. N. S. 258, 268; 30 Law J. Com. P. 365; Hall v. White, 27 Conn. 488, 494; Yeates v. Reed, 4 Blackf. 463, 465; Clement v. Wafer, 12 La. An. 599, 601; cases *ante*, § 66; *infra*, notes 6-12.

6 Roadcap v. Sipe, 6 Gratt. 213, 217. See Cassin v. Delaney, 33 N. Y. 178; Simmons v. Brown, 5 R. I. 299.

7 Dailey v. Houston, 58 Mo. 361, 367; Carter v. Jackson, 56 N. H. 366, 368; Vanneman v. Powers, 56 N. Y. 39, 42; Hawk v. Harman, 5 Binn. 43, 44.

8 Catterall v. Kenyon, 3 Ad. & E. N. S. 310; 2 Gale & D. 345; Estill v. Fort, 2 Dana, 237, 238; Tobey v. Smith, 15 Gray, 535; Heckle v. Lurvey, 101 Mass. 344; 3 Am. Rep. 366; Peak v. Lemon, 1 Laus. 295; Kowling v. Manly, 49 N. Y. 192, 198, 199; 10 Am. Rep. 346.

9 Baker v. Young, 44 Ill. 42, 48; McElfresh v. Kirkendall, 36 Iowa, 224, 228; Tait v. Culbertson, 57 Barb. 9, 10; Fowler v. Chichester, 26 Ohio St. 9, 14; Roadcap v. Sipe, 6 Gratt. 213, 217.

10 Baum v. Mullen, 47 N. Y. 577, 579. See Vaughan v. Vanderstegen, 2 Drew. 363, 379; Davis v. Tingle, 8 Mon. B. 539, 543; *post*, § 424.

11 Ball v. Bennett, 21 Ind. 427, 428.

12 Matthews v. Fiestel, 2 Smith, E. D. 90, 91.

13 Rawlings v. Bell, 1 Com. B. 959; Estill v. Fort, 2 Dana, 237, 238; Coke Litt. § 274, n. 4, § 678; *infra*, n. 15.

14 Rawlings v. Bell, 1 Com. B. 959; *ante*, § 364.

15 Furguson v. Brooks, 67 Me. 251, 258, 259; Vanneman v. Powers, 56 N. Y. 39, 43; Baum v. Mullen, 47 N. Y. 577, 579; Graves v. Spier, 53 Barb. 349, 356; *ante*, §§ 85, 88, 364.

16 Nolan v. Traber, 49 Md. 460, 463; 33 Am. Rep. 277; *ante*, § 63.

17 Carleton v. Haywood, 49 N. H. 314, 318, 319; *ante*, § 66.

§ 424. Torts of married woman connected with invalid contracts. — For her torts, so intimately connected with her invalid contracts that in order to hold her liable for them her invalid contract would have to be substantially enforced, a married woman is not responsible.<sup>1</sup> Thus, she cannot be sued for getting credit by false and fraudulent representations that she is unmarried,<sup>2</sup> or has property she can charge,<sup>3</sup> or for mis-

using property of which she is a bailee,<sup>4</sup> or for misappropriating money intrusted to her.<sup>5</sup> But if her contract is valid, the rule does not apply; thus, she is liable for false and fraudulent representations made in effecting a valid sale of her separate property.<sup>6</sup>

1 *Liverpool v. Fairhurst*, 9 Ex. 422, 429; *Wright v. Leonard*, 11 Com. B. N. 8, 258, 268; *Cannan v. Farmer*, 3 Ex. 638; *Ziegenhagen v. Church*, 5 Ch. L. N. 24; *Oglesby v. Pasco*, 79 Ill. 164, 171; *Owens v. Snodgrass*, 6 Dana, 229, 239; *Lowell v. Daniels*, 2 Gray, 161; *Andrews v. Ormsbee*, 11 Mo. 400, 402; *Carleton v. Haywood*, 49 N. H. 314, 320; *Dempsey v. Tyler*, 3 Duer, 73, 100; *Wilson v. Fuller*, 60 How. Pr. 480, 481; *Barnes v. Harris*, Busb. 15, 16; *Keen v. Coleman*, 39 Pa. St. 299, 302; *Keen v. Hartman*, 48 Pa. St. 497, 499; *Glidden v. Strupler*, 52 Pa. St. 400, 404; *Mason v. Jordan*, 13 R. I. 193, 195; *Woodward v. Barnes*, 46 Vt. 236; 14 Am. Rep. 626; *ante*, § 416. But see *Reis v. Lawrence*, 63 Cal. 129, 135; *Patterson v. Lawrence*, 90 Ill. 174, 179; 32 Am. Rep. 22; *Read v. Hall*, 57 N. H. 482, 483.

2 *Liverpool v. Fairhurst*, 9 Ex. 422, 429; *supra*, n. 1.

3 See *Patterson v. Frazer*, 5 La. An. 586, 587.

4 *Barnes v. Harris*, Busb. 15, 16.

5 *Andrews v. Ormsbee*, 11 Mo. 400, 402; *Carleton v. Haywood* 49 N. H. 314, 320.

6 *Baum v. Mullen*, 47 N. Y. 577, 579.

§ 425. **Enforcement of married women's liability for tort.**—Independently of statute a married woman cannot be sued alone,<sup>1</sup> and therefore in all suits against her for torts her husband must be joinded.<sup>2</sup> He may be joined simply because he is her husband<sup>3</sup>—as in the case of her antenuptial torts,<sup>4</sup> or of torts committed out of his presence and with which he has nothing to do,<sup>5</sup> or as a joint wrong-doer<sup>6</sup>—as when they both were concerned in the tort.<sup>7</sup> His liability in these cases has been elsewhere discussed.<sup>8</sup> It is said that for some wrongs there cannot be a joint suit, because such wrongs do not admit of joint commission<sup>9</sup>—slander being such a wrong.<sup>10</sup> And it is said that in even a joint suit for conversion against husband and wife, the allegation should be that the conversion was to the use of the husband, not to “their” or to “her” use.<sup>11</sup> When the husband is joined as husband only, it should be alleged

that the wrong was committed by the wife.<sup>12</sup> The wife should be summoned, though by an appearance for her such summons is waived,<sup>13</sup> and the husband has full power to appear for her and to manage the suit, and she is bound though the suit be lost through his negligence;<sup>14</sup> this applies, of course, only to suits prosecuted as at common law.<sup>15</sup> All evidence which would have been admissible against the wife, could she have been sued alone, is admissible against the husband when he is sued with her.<sup>16</sup> When they are sued jointly, one may be acquitted and the other found guilty<sup>17</sup>—though the acquittal of the husband will not save him from judgment on account of his being husband, but only from judgment as joint wrong-doer.<sup>18</sup> The judgment is usually entered against them both generally,<sup>19</sup> and may be satisfied out of the property of the husband, or the wife, or both.<sup>20</sup> The husband's property may be taken,<sup>21</sup> and the wife's also, whether separate,<sup>22</sup> or held as at common-law;<sup>23</sup> a judgment of this kind estops her as if she were sole.<sup>24</sup> But, it is said in Texas, the judgment may direct her property to be first exhausted.<sup>25</sup> In some States, though the husband must still be joined for conformity, he is by statute saved from liability.<sup>26</sup> She may be sued alone after the dissolution of coverture—by divorce,<sup>27</sup> or by actual or civil death.<sup>28</sup> So when she may by statute sue and be sued alone, her torts may be enforced against her alone.<sup>29</sup> And when she may be sued alone in respect to all matters relating to her separate property, she may be sued alone for all torts connected with it;<sup>30</sup> for example, for setting fire to her separate house and thus burning another's furniture;<sup>31</sup> for a fraud connected with the sale of her separate lands;<sup>32</sup> for injuries resulting to persons using her separate stages;<sup>33</sup> for depredations of her cattle;<sup>34</sup> for injuries resulting

from the mismanagement of her separate property;<sup>35</sup> for her negligence connected with it;<sup>36</sup> for maintaining a nuisance on it,<sup>37</sup> and, it is said, for refusing to give up the property of another and holding it under a claim that it was her separate property;<sup>38</sup> but not for receiving stolen goods, for no title to them vested in her, and they could not be her separate property.<sup>39</sup>

- 1 Kowing v. Manly, 49 N. Y. 192, 201; 10 Am. Rep. 346; *post*, §
- 2 Catterall v. Kenyon, 3 Ad. & E. N. S. 310; 2 Gale & D. 545; Ball v. Bennett, 21 Ind. 427, 428; Burt v. McBain, 29 Mich. 260, 262; McKeown v. Johnson, 1 McCord, 578, 579; 10 Am. Dec. 698; *ante*, § 66.
- 3 Roadcap v. Sipe, 6 Gratt. 213, 217; *ante*, § 66.
- 4 Hawk v. Harman, 5 Binn. 43, 44; *ante*, § 66.
- 5 Marshall v. Oakes, 51 Me. 303, 309; *ante*, § 66.
- 6 Kowing v. Manly, 49 N. Y. 192, 201; 10 Am. Rep. 346; *ante*, § 66.
- 7 Carter v. Jackson, 58 N. H. 366, 363; *ante*, § 66.
- 8 Discussed fully, *ante*, § 66.
- 9 Carter v. Jackson, 58 N. H. 366, 363.
- 10 Roadcap v. Sipe, 6 Gratt. 213, 217 But see 2 Bish. M. W. § 266; cases cited *ante*, § 423, n. 9.
- 11 Estill v. Fort, 2 Dana, 237, 238; cases *ante*, § 423, n. 8. Except under separate property act: Hagebrush v. Ragland, 73 Ill. 40.
- 12 McKeown v. Johnson, 1 McCord, 578, 579; 10 Am. Dec. 698.
- 13 Smith v. Taylor, 11 Ga. 20, 22-24; *post*, § 452.
- 14 Green v. Branton, 1 Dev. Eq. 500, 504; *post*, § 460.
- 15 Lansing v. Holdridge, 58 How. Pr. 449, 451; *post*, § 460.
- 16 Ball v. Bennett, 21 Ind. 427, 428. See Austin v. Wilson, 4 Cush. 273, 275; Zelff v. Jennings, 61 Tex. 458, 471.
- 17 Daily v. Houston, 58 Mo. 361, 367, 368; Reugler v. Lilly, 26 Ohio St. 48, 49; Roadcap v. Sipe, 6 Gratt. 213, 218.
- 18 The broader language of the cases seems unjustifiable.
- 19 Hall v. White, 27 Conn. 488, 494; Smith v. Taylor, 11 Ga. 20, 22; Baker v. Young, 44 Ill. 42, 48; Tait v. Culbertson, 51 Barb. 9, 11; Corn v. Brazelton, 2 Swan, 273, 275; Zelff v. Jennings, 61 Tex. 458, 471.
- 20 Howard v. North, 5 Tex. 290, 299; 51 Am. Dec. 769.
- 21 See cases *ante*, § 66.
- 22 Smith v. Taylor, 11 Ga. 20, 22; Chanvier v. Fliege, 6 La. An. 56, 58; Brown v. Kemper, 27 Md. 666, 673. But see Vanderheyden v. Mallon, 1 Comst. 452, 462.
- 23 Green v. Branton, 1 Dev. Eq. 500, 504.
- 24 Brown v. Kemper, 27 Md. 666, 673.
- 25 Zelff v. Jennings, 61 Tex. 458, 471.
- 26 Burt v. McBain, 29 Mich. 260, 262; Md. Acts of 1830, ch. 253, § 21.
- 27 Kowing v. Manly, 49 N. Y. 192, 201; 10 Am. Rep. 346; Stewart M. & D. §§ 448, 449.

23 2 Addis. Torts, 1125; Wright v. Leonard, 11 Com. B. N. S. 253, 263; Kowing v. Manly, 49 N. Y. 192, 201; 10 Am. Rep. 346.

29 See Lansing v. Holdridge, 53 How. Pr. 449, 451.

30 Rowe v. Smith, 45 N. Y. 220, 233. See Ferguson v. Brooks, 67 Me. 251, 253.

31 Lansing v. Holdridge, 53 How. Pr. 449, 451.

32 Baum v. Mullen, 47 N. Y. 577, 579.

33 Gilles v. Lent, 2 Abb. N. S. 455; Peak v. Lemon, 1 Lans. 295, 299.

34 Rowe v. Smith, 45 N. Y. 230, 233; 55 Barb. 417; 33 How. Pr. 37.

35 Eagle v. Swayze, 2 Daly, 140, 142.

36 Fiske v. Bailey, 51 N. Y. 150, 153.

37 Rowe v. Smith, cited *supra*, n. 34.

38 Peak v. Lemon, 1 Lans. 295, 299, 301.

39 Musser v. Lewis, 50 N. Y. Super. 431, 440.

## CHAPTER XXV.

### CRIMES OF MARRIED WOMEN.

426. Married women's liability for crime.

§ 427. Proof of married women's guilt.

§ 426. **Liability of married women for crime.**—A married woman continues liable for any crime committed before her marriage,<sup>1</sup> and during coverture may render herself liable to prosecution for any crime as if unmarried,<sup>2</sup> with the following exceptions: (1) She cannot be guilty of conspiracy with her husband;<sup>3</sup> (2) or of larceny for appropriating his goods.<sup>4</sup> (3) She cannot be prosecuted for receiving goods her husband has stolen;<sup>5</sup> (4) or for aiding him to escape detection in a crime he has committed.<sup>6</sup> This subject is fully treated in Desty's "American Criminal Law."<sup>7</sup>

1 This has never been questioned. Compare *ante*, § 422.

2 See cases cited *ante*, §§ 49, 63; Desty Crim. Law, §§ 15*a*, 16*a*, 17*a*; 1 Russell Crimes, 354.

3 *People v. Mather*, 4 Wend. 229; 21 Am. Dec. 122; Desty Crim. Law, § 17*a*.

4 *Com. v. Hartnett*, 3 Gray, 450; *ante*, §§ 47, 49.

5 *Reg. v. Brooks*, Dears. C. C. 184; Desty Crim. Law, § 17*a*.

6 *Reg. v. Goode*, 1 Car. & K. 135; Desty Crim. Law, § 17*a*.

7 Desty Crim. Law, §§ 15*a*-17*a*.

§ 427. **Proof of guilt of married women.**—To convict a married woman for an act which would be criminal were she unmarried when it was committed, it must affirmatively appear: (1) That her husband was absent at the time,<sup>1</sup> for, from his presence his coercion is implied;<sup>2</sup> (2) or that being present he did not or could not coerce her;<sup>3</sup> (3) or that it is a crime *malum in se* (murder, robbery, treason, etc.<sup>4</sup>); or peculiarly feminine<sup>5</sup> (as keeping a bawdy house<sup>6</sup>); or specially covered by a statute expressly referring to married woman.<sup>7</sup>

- 1 *Rex v. Morris*, Russ. & R. 270 ; *Desty Crim. Law*, § 16 *a*.
- 2 *Ante*, §§ 417, 424 ; *Desty Crim. Law*, § 16 *a*.
- 3 *Nolan v. Traber*, 49 Md. 469 ; 33 Am. Rep. 277.
- 4 *Com. v. Neal*, 10 Mass. 152 ; 6 Am. Dec. 105 ; *Desty Crim. Law*  
§ 16 *a*.
- 5 *Pennybaker v. State*, 2 Blackf. 484.
- 6 *Com. v. Cheney*, 114 Mass. 281 ; *Desty Crim. Law*, § 16 *a*.
- 7 See Md. Rev. Code 1878, art. 12, § 42.

## CHAPTER XXVI.

### SUITS OF MARRIED WOMEN.

ART. I. IN GENERAL, §§ 428-437.

II. SUITS BY MARRIED WOMEN, §§ 438-447.

III. SUITS AGAINST MARRIED WOMEN, §§ 448-459.

IV. MANAGEMENT OF MARRIED WOMEN'S SUITS,  
§§ 460-463.

#### ART I.—SUITS OF MARRIED WOMEN, IN GENERAL.

§ 428. Preliminary note.

§ 429. Rights and remedies distinguished.

§ 430. Effect of marriage on pending suits.

§ 431. Suits of married women at common law.

§ 432. Suits of married women in equity and by statute.

§ 433. Suits between husband and wife.

§ 434. Effect of dissolution of marriage on pending suits.

§ 435. Law of forum governs remedies.

§ 436. Law of time of suit brought governs remedies.

§ 437. Costs.

§ 428. **Preliminary note.**—The topic of parties to married women's suits is treated in "Hawes on Parties"; the practice in these suits is in no two States the same, and the subject is a very broad one, so that a minute discussion thereof is not attempted.

§ 429. **Rights and remedies distinguished, etc.**—*Ubi jus, ibi remedium* is a familiar maxim,<sup>1</sup> but the right and the remedy are quite distinct. Thus, while the right depends, generally speaking, on the law of the place where<sup>2</sup> and the time when<sup>3</sup> it arose, the remedy depends on the law of the place where,<sup>4</sup> and the time when<sup>5</sup> the suit is brought; and a statute enabling a married woman to sue alone gives her no new rights, but simply changes the form of procedure.<sup>6</sup> While



this is true, nevertheless suits of married women cannot be understood without a comprehension of and reference to the respective rights of husband and wife in her property, of their respective rights in her choses in action, in contract, and in tort, and of their respective liabilities for contracts made and wrongs committed by her. Thus, a husband may sue alone for his wife's chattels,<sup>7</sup> or for the rents of her lands,<sup>8</sup> for such property is absolutely his at common law;<sup>9</sup> so he may join her in his suits on her choses in action,<sup>10</sup> for in these she has the right of survivorship at common law.<sup>11</sup> He may sue alone respecting the community,<sup>12</sup> since he has during coverture the full management thereof.<sup>13</sup> On the other hand, she cannot be a party to a suit for an injury to him,<sup>14</sup> since she has (independently of statute) no right to damages for loss of his services, etc.<sup>15</sup> Nor is she suable after his death for necessities supplied to her during coverture,<sup>16</sup> for such a debt is his and not hers.<sup>17</sup> The remedy is always subservient to the right, and if a wife gets a judgment against her husband in ejectment, it must be so framed as not to interfere with his marital right to cohabit with her.<sup>18</sup> Rights and obligations not dependent on the marriage state may also modify the remedies of and against married women: her husband may join with her as plaintiff whenever he is actually injured or interested;<sup>19</sup> and may be joined with her as defendant whenever he has rights to be affected, or which might be affected by the suit;<sup>20</sup> or has been a party to the wrong complained of,<sup>21</sup> as where he and his wife have jointly ejected the complainant.<sup>22</sup>

1 *Tunks v. Grover*, 57 Me. 586, 588.

2 *Oliver v. Robertson*, 41 Tex. 422, 425; *ante*, §§ 24-37.

3 *Grove v. Todd*, 41 Md. 633, 641; 20 Am. Rep. 76; *ante*, §§ 19-23.

4 *Bank v. Williams*, 46 Miss. 618, 629; 12 Am. Rep. 319, *post*, § 435; *ante*, §§ 20, 21.

H. & W. — 53.

- 5 Shonk v. Brown, 61 Pa. St. 320, 327; *post*, § 436; *ante*, § 35.
- 6 Matson, 4 Met. (Ky.) 262.
- 7 Goddard v. Johnson, 14 Pick. 352; *ante*, § 170; Hawes Parties, §§ 63, 64.
- 8 Boggs v. Price, 64 Ala. 519; *ante*, §§ 141-145; Hawes Parties, §§ 63-66.
- 9 Discussed *ante*, §§ 141-183.
- 10 Griffith v. Coleman, 5 Marsh. J. J. 600; Hawes Parties, §§ 64, 65.
- 11 Discussed *ante*, §§ 76, 171-176.
- 12 Edrington v. Newland, 57 Tex. 627.
- 13 Discussed *ante*, § 315.
- 14 Monroe v. Maples, 1 Root, 422.
- 15 *Ante*, §§ 77-80.
- 16 Carter v. Wann, 45 Ala. 343. Consult *ante*, §§ 357, 366, 368.
- 17 *Ante*, § 81.
- 18 Manning, 79 N. C. 233; 23 Am. Rep. 324.
- 19 McMullen v. Van Zant, 73 Ill. 190, 193; Forbes v. Tuckerman, 115 Mass. 115, 118; Hopkins v. Angell, 13 R. I. 670.
- 20 Indianapolis v. McLaughlin, 77 Ill. 275; Hawes Parties, §§ 63-70.
- 21 *Ante*, §§ 66, 423; Hawes Parties, § 70.
- 22 Tilton v. Barrell, 8 Sawy. 412; 14 Fed. Rep. 600; Smith, 56 N. H. 330.

§ 430. **Effect of marriage on pending suits.**—The marriage of a woman does not, at common law, destroy her liability on her antenuptial contracts, or for her antenuptial torts, but simply renders her husband jointly liable with her;<sup>1</sup> nor does she by marriage entirely lose her rights of action, for, though her husband may reduce them to possession, if not so reduced during coverture they survive to her;<sup>2</sup> so that if a suit is pending at the time of marriage, after marriage the husband has interests to be affected, and the opposing party stands in a new position, and the suit abates.<sup>3</sup> But at present the effect of marriage on pending suits is almost entirely controlled by local statutes. In Alabama, for instance, the suit does not abate, but the marriage is suggested, and the husband is joined;<sup>4</sup> while in Tennessee the suit abates, may be revived against her husband, and in case of his death survives

against her.<sup>5</sup> It is said a defendant may plead in abatement, or by *scire facias* have the husband made a party;<sup>6</sup> and if he omits to do this, cannot allege coverture after judgment; or, if the woman is a defendant, and no plea is entered, the suit may proceed to execution without noticing the marriage,<sup>8</sup> and she may be taken in execution as if sole.<sup>9</sup> Generally speaking, if the husband is a necessary party to a suit brought during coverture, he should be joined upon his marriage in all his wife's antenuptial suits.<sup>10</sup>

1 Discussed *ante*, §§ 66, 67.

2 Discussed *ante*, §§ 170-173.

3 See cases cited *infra*.

4 *Lamkin v. Dudley*, 34 Ala. 116, 117.

5 *Parker v. Steed*, 1 Lea, 206.

6 *James v. Taft*, 8 Port. 476; *Townshend*, 10 Gill & J. 373; *Bates v. Stevens*, 4 Vt. 545.

7 *Bates v. Stevens*, 4 Vt. 545; *post*, § 444.

8 *Evans v. Lipscomb*, 23 Ga. 71; *Sacket v. Wilson*, 2 Blackf. 85.

9 *Haines v. Corliss*, 4 Mass. 659.

10 *Gibson*, 43 Wis. 23, 24, 28; 28 Am. Rep. 527.

§ 431. Suits of married women at common law.—At common law, speaking generally, and for reasons stated in sections 429 and 430, a married woman could neither sue nor be sued unless her husband was joined with her;<sup>1</sup> and this is still *prima facie* the rule, and the causes which enable her to sue or render her liable to be sued at all must be alleged and proved.<sup>2</sup> At common law the suit was treated as the suit of the husband,<sup>3</sup> and he could, as defendant, allow judgment to be entered,<sup>4</sup> or as plaintiff, release the cause of action.<sup>5</sup> He employed the counsel,<sup>6</sup> and was liable for the costs.<sup>7</sup>

1 *Porter v. Bank*, 19 Vt. 410, 417. See *Kimbro v. First*, 1 McAr. 65; *Cowand v. Pulley*, 9 La. An. 12, 13; *Tucker v. Scot*, 3 N. J. L. 955; *Howland v. Fort*, 8 How. Pr. 505; *McIntire v. Chappell*, 2 Tex. 378, 379.

2 *Smith v. New England*, 45 Conn. 416, 420. See *Durden v. McWilliams*, 31 Ala. 438; *Lewis v. Moore*, 25 Ark. 63; *Hyatt v. Cochran*, 85 Ind. 231; *Cowand v. Pulley*, 9 La. An. 12, 13; *Ridgely v. Crandall*, 4 Md. 435; *Gregory v. Paul*, 15 Mass. 31; *Tracy v. Keith*, 11 Allen,

214, 215; *Kennedy v. Williams*, 11 Minn. 318, 319; *Pleckerling v. De Rochemont*, 45 N. H. 67; *Dutton v. Rice*, 53 N. H. 496, 499; *McIntire v. Chappell*, 2 Tex. 378, 379; *Williams v. Brainard*, 52 Vt. 392; *Botkin v. Earl*, 6 Wis. 393, 396.

3 *Benjamin v. Bartlett*, 3 Mo. 86, 87; *post*, ‡ 460.

4 *Vick v. Pope*, 81 N. C. 22, 26; *post*, ‡ 460.

5 *Southworth v. Packard*, 7 Mass. 95, 96; *post*, ‡ 460.

6 *Frazier v. Felton*, 1 Hawks, 231, 237; *post*, §§ 460, 462.

7 Discussed *post*, ‡ 437.

‡ 432. Suits of married women in equity and under statutes.—In equity, independently of statute, suits of married women, except those for enforcing her equity to a settlement and those concerning her equitable separate estate, are governed by the same rules which control suits at law.<sup>1</sup> Still, in equity, neither the husband's bill nor his answer is binding upon her.<sup>2</sup> When applying for her settlement out of her choses in action, she sues by her next friend, generally making her husband one of the defendants.<sup>3</sup> As to her equitable separate estate, she sues by her next friend and jointly with her trustee, if she has one, making her husband a defendant if his interests in any way conflict;<sup>4</sup> and when she is sued, her trustee (if she has any) should be joined,<sup>5</sup> and she may come in and give a separate answer by next friend.<sup>6</sup> In the different States, statutes have so differently changed the procedure in suits of married women that no general statement can be given; the statutes of the State where the particular suit is brought, or is about to be brought, must in each case be consulted.<sup>7</sup>

1 *Porter v. Bank*, 19 Vt. 410, 417; *ante*, §§ 210, 211, 431.

2 *Bein v. Heath*, 6 How. 228, 239; *Grant v. Van Schoonhoven*, 9 Paige, 255, 257; 37 Am. Dec. 393; *Bird v. Davis*, 14 N. J. Eq. 467, 479; *post*, §§ 460, 461.

3 *Bradley v. Emerson*, 7 Vt. 369, 371; *ante*, ‡ 192; *post*, ‡ 433.

4 *Johnson v. Vail*, 14 N. J. Eq. 423; *ante*, ‡ 210; *post*, §§ 433, 440.

5 *Palmer v. Rankins*, 30 Ark. 771; *ante*, ‡ 211; *post*, ‡ 450.

6 *Wolf v. Banning*, 3 Minn. 202; *post*, ‡ 461.

7 *Powers v. Totten*, 42 N. J. L. 442, 443; *post*, ‡ 435.

§ 433. *Suits between husband and wife.*—Suits between husband and wife have already been somewhat fully discussed.<sup>1</sup> At common law one spouse could not sue the other,<sup>2</sup> both because the wife could not sue or be sued without her husband,<sup>3</sup> and because husband and wife were one person.<sup>4</sup> But in equity, where the separate existence and property of wives were recognized, they could sue each other,<sup>5</sup> only the wife had to sue by next friend.<sup>6</sup> And after dissolution of the marriage by divorce, either could sue the other at law;<sup>7</sup> and such suits could be maintained between the representatives of the deceased and the survivor, where the marriage was dissolved by death.<sup>8</sup> When the husband files a bill for a purpose which would affect the interests of his wife, she must be made a party defendant;<sup>9</sup> and so she must make him a party defendant when she files a bill for the protection of her property from him or his creditors.<sup>10</sup> If she can sue without her husband, she can make him the garnishee or trustee of a third party.<sup>11</sup> When she can alone sue him, she can alone sue others with him,<sup>12</sup> or sue a firm of which he is a member.<sup>13</sup> In many States statutes expressly authorize married women to sue and be sued by their husbands.<sup>14</sup> Whether a statute, authorizing a married woman to sue and be sued alone as if sole, authorizes suits between husband and wife is disputed.<sup>15</sup>

1 *Ante*, §§ 52-56.

2 Hobbs, 70 Me. 381, 383. S. P., Peters, 42 Iowa. 182; Withers v. Shropshire, 15 Mo. 631; Ward, 2 Dev. Eq. 553; Ritter, 31 Pa. St. 396; Marvin, 10 Phila. 524; *ante*, § 52.

3 McIntire v. Chappell, 2 Tex. 378, 379; *post*, §§ 441, 451.

4 Porter v. Bank, 19 Vt. 410, 417, *ante*, §§ 39, 52.

5 Markham, 4 Mich. 305, 307; Reiper, 79 Mo. 352, 259; Walter, 48 Mo. 140, 145; *ante*, § 53.

6 Leftwick v. Hamilton, 9 Heisk. 310, 313; Porter v. Bank, 19 Vt. 410, 417; *post*, § 442.

7 Webster, 58 Me. 138, 145; 4 Am. Rep. 253; Carleton, 72 Me. 115; 39 Am. Rep. 307; Blake, 64 Me. 177, 180; *ante*, § 55.

8 *Willis v. Jones*, 57 Md. 362; 1111, 38 Md. 183; *Barton*, 32 Md. 214; *ante*, § 55.

9 *Grant v. Van Schoonhoven*, 9 Paige, 255, 257; *Alston v. Jones*, 3 Barb. Ch. 397, 410; *Hale v. Gause* 3 Ired. Eq. 116; *ante*, §§ 136, 280.

10 *Eddins v. Buck*, 23 Ark. 507; *Kirkpatrick v. Buford*, 21 Ark. 268; *Lewis v. Elrod*, 38 Ala. 17; *Boyd v. England*, 56 Ga. 598; *Johnson v. Vail*, 14 N. J. Eq. 423; *Cantrell v. Davidson*, 3 Tenn. Ch. 426; *Marston v. Ward*, 35 Tex. 797; *Bradley v. Emerson*, 7 Vt. 369, 371.

11 *Tunks v. Grover*, 57 Me. 586, 588.

12 *Kashaw*, 3 Cal. 321.

13 *Benson v. Morgan*, 50 Mich. 77; *Devin*, 17 How. Pr. 514; *Bennett v. Winfield*, 4 Heisk. 440. Compare *Edwards v. Stevens*, 3 Allen, 315.

14 *Larison*, 9 Ill. App. 27; *Wilkins v. Miller*, 9 Ind. 100, 101; *Jones*, 19 Iowa, 336; *Greer*, 24 Kan. 101; *Hardin v. Gerard*, 11 Bush, 259; *Power v. Lester*, 23 N. Y. 527; *Manning*, 79 N. C. 293; 28 Am. Rep. 324; *ante* § 54.

15 See *Smith v. Gorman*, 41 Me. 405; *Crowther*, 55 Me. 353; *Schultz*, 89 N. Y. 644; *Ryan*, 61 Tex. 473, 474; *ante*, § 54.

§ 434. Effect of dissolution of marriage on pending suits.—At common law, on the dissolution of marriage, the joint suit of husband and wife in her right abated; at present, generally, the suit will either abate and have to be revived by her or her representatives, or may be amended and continued by her or her representatives;<sup>1</sup> if the joinder of the husband is merely formal there is usually no abatement.<sup>2</sup> Thus, in case of her husband's death she has her right of action on her choses in action as survivor;<sup>3</sup> and if she dies, he, at common law, prosecutes the suit as survivor or as administrator.<sup>4</sup> Divoree has much the same effect as the husband's death.<sup>5</sup>

1 *Patter v. Harrington*, 11 Pick. 221, 222. See *Tallmadge v. Grannis*, 20 Conn. 296, 297; *Tuttle v. Fowler*, 22 Conn. 58, 63; *Buck v. Goodrich*, 33 Conn. 37, 41; *Wass v. Plummer*, 68 Me. 267, 268; *Norcross v. Stewart*, 50 Me. 88; *Pettingill v. Butterfield*, 45 N. H. 195; *Little v. Downing*, 37 N. H. 355, 364; *Wood v. Griffin*, 46 N. H. 230, 237; *Armstrong v. Colby*, 47 Vt. 364, 368; *Meese v. Fond*, 48 Wis. 223.

2 *Calderwood v. Pyser*, 31 Cal. 333.

3 *Story v. Baird*, 14 N. J. L. 262, 268; *King v. Little*, 77 N. C. 138, 139; *Little v. Keyes*, 24 Vt. 118, 121; *ante*, § 176; *Stewart M. & D.* § 460; *Hawes Parties*, § 63.

4 *Patter v. Harrington*, 11 Pick. 221, 222; *ante*, § 175; *Stewart M. & D.* § 465.

5 *Tuttle v. Fowler*, 22 Conn. 58, 63; *Stewart M. & D.* § 430.

§ 435. Remedies depend on the *lex fori*.—By whatever law rights are to be governed, the nature and form of the remedy is to be determined by the law of the State where the suit is brought.<sup>1</sup> Thus, though where a married woman's contract is made it is enforceable at law, if the law of the forum requires married women's contract to be enforced in equity, the remedy must be in equity;<sup>2</sup> and so, if the law of the forum requires the husband to be joined, she cannot sue or be sued alone.<sup>3</sup> And though where the contract was made she would have had to sue by next friend, she can sue alone if the law of the forum allows it.<sup>4</sup> If the right exists, the forum must allow it to be enforced,<sup>5</sup> though it is a right which could not have arisen in that State.<sup>6</sup> Rights *in rem* as well as remedies are governed by the law of the forum.<sup>7</sup>

1 King v. Martin, 67 Ala. 177, 183; Powers v. Totten, 42 N. J. L. 442, 443; Hayden v. Stone, 13 R. I. 106, 111; cases *ante*, § 35.

2 Halley v. Ball, 66 Ill. 251, 252.

3 Hayden v. Stone, 13 R. I. 106, 111.

4 Stoneman v. Erie, 52 N. Y. 429, 432.

5 See Tunks v. Grover, 57 Me. 586, 588.

6 Brigham v. Gilmartin, 58 N. H. 346.

7 Hayden v. Stone, 13 R. I. 106, 110.

§ 436. The law of time of suit brought governs remedies.—The constitutional prohibitions against divesting vested rights, etc.,<sup>1</sup> do not prevent a change of remedies so long as a substantial remedy is given or left;<sup>2</sup> so that an act enabling a married woman to sue and be sued alone may apply to existing as well as to future rights of action;<sup>3</sup> or a remedy on an existing contract may be changed from equity to law,<sup>4</sup> and even the husband's right to sue jointly with his wife, for personal injuries to her, may be taken away.<sup>5</sup> If no valuable rights are disturbed, for the sake of simplicity, statutes changing the form of remedies are applied to existing

as well as to future causes of action ;<sup>6</sup> but a contrary construction is given if valuable though not vested rights would thereby be disturbed.<sup>7</sup> As to vested rights, such as the husband's right as tenant during coverture *jure uxoris*<sup>8</sup> to sue for trespass to the property,<sup>9</sup> they cannot be disturbed, of course.<sup>10</sup>

1 Discussed *ante*, §§ 19-23.

2 Deering v. Boyle, 8 Kan. 525-533 ; 12 Am. Rep. 490.

3 Maysville v. Herrick, 13 Bush, 122, 125.

4 Buckingham v. Moss, 40 Conn. 461, 463 ; Herbert v. Gray, 38 Md. 529, 532.

5 Ball v. Bullard, 52 Barb. 141, 143, 144.

6 Buckingham v. Moss, 40 Conn. 461, 463 ; Maysville v. Herrick, 13 Bush 122, 125 ; *ante*, § 20.

7 Kimbro v. First, 1 McAr. 61, 71 ; Greenleaf v. Hill, 31 Me. 562, 564 ; Herbert v. Gray, 38 Md. 529, 532 ; Dugan v. Morrow, 31 N. J. L. 136, 138 ; Powers v. Totten, 42 N. J. L. 442, 443 ; *ante*, § 20.

8 Discussed *ante*, §§ 146-150.

9 Bannister v. Bull, 16 S. C. 220, 230 ; *ante*, §§ 21, 22.

10 Discussed *ante*, §§ 19-23.

§ 437. **Costs in suits of married women.**—1. *Married women plaintiffs.* At common law, a married woman suing as plaintiff (except in cases in which she could sue alone<sup>1</sup>) was an inactive party, the control of the suit being in her husband,<sup>2</sup> and was not liable for costs ;<sup>3</sup> nor could costs incurred in a suit at law be charged on her equitable separate estate in equity.<sup>4</sup> Owing to this immunity of a married woman from costs, she could not sue alone in equity even, but had to proceed by next friend, that some one might be responsible in case of loss of the suit ;<sup>5</sup> and some modern enabling acts have required the next friend to be joined, presumably for the same reason.<sup>6</sup> But if the married woman has separate property, and the right to sue with respect thereto, it must bear the costs of an unsuccessful suit relating to it.<sup>7</sup> If she can sue alone, her privilege is accompanied with the usual burdens, and she is liable for costs.<sup>8</sup>



2. *Married women defendants.* If a judgment can be obtained against a married woman which will be binding on her property, the judgment is equally binding, though it includes costs.<sup>9</sup> But when her husband is or should be joined with her, a decree for costs against her alone cannot be passed.<sup>10</sup>

1 Leonard v. Townsend, 26 Cal. 435; *post*, § 441.

2 Frazier v. Felton, 1 Hawks, 231, 237; *post*, § 460.

3 Kimbro v. First, 1 McAr. 61, 65, 66; Harper v. Whitehead, 33 Ga. 138, 144; Browner v. Bell, 30 Ga. 334, 338; Musgrove, 54 Ill. 186, 187, 188; Hubbard v. Barcus, 38 Md. 166, 174; Bellinger v. Thomson, 2 Rich. Eq. 30; Baker, 1 Bail. Eq. 165 Consult *post*, § 463.

4 Kimbro v. First, 1 McAr. 61, 66.

5 Harper v. Whitehead, 33 Ga. 138, 144; Baker, 1 Bail. Eq. 165; *post*, § 440.

6 Frazier v. White, 49 Md. 1, 8; Md. R. C. 1878, art. 51, § 22.

7 Musgrove, 54 Ill. 186, 188.

8 Leonard v. Townsend, 26 Cal. 435; Moncrief v. Ward, 16 Abb. Pr. 354 a; *post*, §§ 462, 463.

9 See *post*, § 457.

10 Hubbard v. Barcus, 38 Md. 166, 174.

## ARTICLE II.—SUITS BY MARRIED WOMEN.

§ 438. Modes in which married women may sue.

§ 439. Suits jointly with husband.

§ 440. Suits by trustee or next friend.

§ 441. Suits by married women alone.

§ 442. The causes of action.

§ 443. The defenses.

§ 444. Plea of coverture against married women.

§ 445. Plea of limitations against married women.

§ 446. Special proceedings of married women.

§ 447. The ownership of the proceeds of suit.

§ 438. *Modes in which married women's suits may be brought.*—Under different laws and circumstances, married women's suits have been properly brought in the following modes: (1) By husband and wife jointly;<sup>1</sup> (2) by the wife and her trustee;<sup>2</sup> (3) by the wife through her next friend;<sup>3</sup> and (4) by the wife alone.<sup>4</sup> The first mode was the only one at common law, unless the wife

had for some reason the capacity of a *femme sole*; the second and third were the usual modes of procedure in equity respecting equitable separate property; and the fourth was the mode in which a wife, who on account of her husband's civil death, etc., had the capacities of a *femme sole*, brought suit at common law, and the usual way in which she sues under modern statutes. Although many statutes giving married women modes of suit unknown at common law have been construed to supersede the common-law modes, and to make a suit brought as at common law improper,<sup>5</sup> a statute which enables a married woman to sue by next friend does not *necessarily* deprive her of the privilege of proceeding jointly with him as at common law;<sup>6</sup> and in other cases, the common-law mode has been held not wholly superseded.<sup>7</sup>

1 Hawes Parties, §§ 63-66; *post*, ‡ 439.

2 See Smith v. Chappell, 31 Conn. 533, 533; *post*, ‡ 440.

3 Bein v. Heath, 6 How. 223, 240; *post*, ‡ 440.

4 Wothington v. Cooke, 52 Md. 237, 207; *post*, ‡ 441.

5 See Rockwell v. Clark, 44 Conn. 534; Hayner v. Smith, 63 Ill. 470, 432; Stampoffski v. Hooper, 75 Ill. 242, 245; Tuttle v. Chicago, 42 Iowa, 518; Hannon v. Madden, 10 Bush, 664, 667; Forbes v. Tuckerman, 115 Mass. 115; Alexander v. Goodwin, 54 N. H. 423, 424; Harris v. Webster, 58 N. H. 481; Cooper v. Alger, 51 N. H. 172; Whidder v. Coleman, 47 N. H. 297; Tantum v. Coleman, 26 N. J. Eq. 128; Palmer v. Davis, 28 N. Y. 242.

6 Abraham v. Tappe, 69 Md. 317, 323; Herzberg v. Sachse, 60 Md. 426, 432.

7 See Kays v. Phelan, 19 Cal. 128, 129; East v. Cox, 57 Ga. 252; Windsor v. Bell, 61 Ga. 671, 676; Smith v. Silence, 4 Iowa, 321, 324; Phelps v. Walthen, S. C. Mo. 1884; Johnson v. Cummings, 15 N. J. Eq. 97, 106.

‡ 439. Suits by husband and wife jointly. — At common law, on all rights of action in which the wife had any interest, the husband and wife sued jointly,<sup>1</sup> not only because they each had substantial interests at stake,<sup>2</sup> but also because the wife's legal existence was merged in that of her husband;<sup>3</sup> so that they so sued not only for all damages to her person or property, and for all

her debts,<sup>4</sup> but even in suits by her as administratrix or guardian.<sup>5</sup> The suit was really the suit of the husband, as it was in his exclusive control,<sup>6</sup> and as he could employ the counsel,<sup>7</sup> and was alone responsible for costs.<sup>8</sup> When husband and wife sue jointly, her interest must affirmatively appear,<sup>9</sup> and the marriage must be alleged.<sup>10</sup> If she sues alone, the declaration may be amended and her husband joined.<sup>11</sup> If she sued alone and no objection was made by plea, none could have been made afterwards;<sup>12</sup> still, though a suit brought by her alone for partition had reached its end without objection, the title passed would not have been good,<sup>13</sup> for the husband's substantial rights would not have been destroyed.<sup>14</sup> In suits respecting equitable separate estate it was never necessary to join the husband;<sup>15</sup> and under statutes creating statutory separate estate this is rarely required.<sup>16</sup> Whether in such suits the husband may be joined as a mere formal party seems to be disputed, and to depend very largely on the character of the suit;<sup>17</sup> sometimes his joinder is required where he has no rights, merely for conformity.<sup>18</sup> Whenever he has actual interests he may of course be joined.<sup>19</sup>

1 Hawes Parties, §§ 63-66.

2 Discussed *ante*, §§ 171-183.

3 Discussed *ante*, §§ 38, 39, 331.

4 *Burger v. Belsley*, 45 Ill. 72, 74. See *Lignoski v. Bruce*, 8 Fla. 269; *Gee v. Lewis*, 20 Ind. 149; *Tribble v. Fryer*, 5 Marsh. J. J. 179; *Petty v. Malier*, 14 Mon. B. 246; *Anderson*, 11 Bush, 327; *Bodgett v. Ebbing*, 24 Miss. 245; *Wyatt v. Simpson*, 8 W. Va. 394; *Hawes Parties*, §§ 63-66.

5 *Brick v. Fisher*, 2 Colo. 709, 710; *Byrne v. Van Hoesen*, 5 Johns. 66; *Mitchell v. Wright*, 4 Tex. 283.

6 *Vick v. Pope*, 81 N. C. 22, 26; *post*, § 460.

7 *Frazier v. Felton*, 1 Hawks, 231, 237; *post*, §§ 460, 461.

8 *Bellinger v. Thomson*, 2 Rich. Eq. 30; *ante*, § 437.

9 *Lewis v. Moore*, 25 Ark. 63; *Ridgely v. Crandall*, 4 Md. 435; *Pickering v. De Rochemont*, 45 N. H. 67; *ante*, § 431, n. 2.

10 *Milton v. Haden*, 32 Ala. 30; *Tanner v. White*, 15 Ala. 798.

- 11 Glick v. Hartman, 10 Iowa, 410; Sherron v. Hall, 4 Lea, 438.
- 12 Quarrier v. Baltimore, 20 W. Va. 424; *post*, § 444.
- 13 Spring v. Sandford, 7 Paige, 550.
- 14 See *ante*, §§ 143, 146, 151.
- 15 Bradley v. Emerson, 7 Vt. 369, 371; *post*, § 440; *ante*, § 210.
- 16 Emerson v. Clayton, 32 Ill. 493, 497; Hollingsworth, 8 Ind. 257; *post*, § 441.
- 17 *Pro*, Keys v. Phelan, 19 Cal. 123, 129; Herzberg v. Sachse, 60 Md. 426, 432; Burns v. Lynde, 6 Allen, 305. *Contra*, Hayner v. Smith, 63 Ill. 430, 432; Harris v. Webster, 53 N. H. 481. See cases *ante*, § 438.
- 18 See citations *supra*, n. 17.
- 19 Wing v. Goodman, 75 Ill. 159; Henry v. Gregory, 29 Mich. 68; Armstrong v. Colby, 47 Vt. 360.

§ 440. Suits of married women by trustees or next friend. — When a married woman has separate property, and a trustee is named, he should join with her;<sup>1</sup> though if the proceeding be adverse to him, she sues by her next friend, making him a defendant.<sup>2</sup> Inasmuch as there is quite commonly no trustee named in settlements creating separate estate, and when one is named he is often the husband,<sup>3</sup> and inasmuch as when none is named the husband is presumed to be and is treated as such,<sup>4</sup> these suits are frequently brought by the husband and wife jointly. But when so joined the husband has no such power over the suit as he has over the joint suits of himself and wife at law.<sup>5</sup> The usual mode, however, in which a married woman proceeds in equity concerning her separate rights is by next friend.<sup>6</sup> The next friend is joined in order that the court may have a person *sui juris* subject to its orders,<sup>7</sup> and in order that there may be some one responsible for costs.<sup>8</sup> The wife need not have any special permission to sue by next friend;<sup>9</sup> and if she has sued alone she may amend and join her next friend.<sup>10</sup> Her husband is generally her next friend,<sup>11</sup> and in one case this is said to be his right if he has no conflicting interests;<sup>12</sup> but it is believed that any one may be next friend,<sup>13</sup> and that the husband is under

disability to be so when he has conflicting interests.<sup>14</sup> The wife suing her husband must proceed by next friend.<sup>15</sup> She may by her next friend sue the trustees of her separate estate,<sup>16</sup> or file a bill for discovery to aid a suit which she is prosecuting alone at law.<sup>17</sup> Though a married woman is not bound by a bill filed by her husband for her and himself jointly,<sup>18</sup> she is bound by one filed by him as her next friend.<sup>19</sup> The next friend may make the affidavit to the bill.<sup>20</sup> But she is the substantial party, and if she gives him security for costs, may dismiss the bill against his wishes.<sup>21</sup> She cannot, however, sue at law by next friend,<sup>22</sup> unless she is so empowered by statute;<sup>23</sup> and a statute enabling her to sue at law by next friend does not necessarily destroy her right to sue jointly, if she so chooses.<sup>24</sup>

1 See *Friend v. Oliver*, 27 Ala. 532, 534; *Smith v. Chappell*, 31 Conn. 589, 593; *Schenk v. Ellingwood*, 3 Edw. 175. See *Alston v. Jones*, 2 Barb. Ch. 397, 401.

2 *Robert v. West*, 15 Ga. 122, 148; *Kenley*, 3 Miss. 751, 753.

3 See *ante*, § 202.

4 *Riley*, 25 Conn. 154, 161; *ante*, § 202.

5 See *post*, § 460.

6 *Bein v. Heath*, 6 How. 223, 240; *Harper v. Whitehead*, 33 Ga. 138, 144; *Kenley*, 3 Miss. 751, 753; *Grant v. Van Schoonhoven*, 9 Paige, 255, 257; 37 Am. Dec. 393; *Garlick v. Strong*, 3 Paige, 440; *Jordan v. Gray*, 19 Ohio, 618; *Bellinger v. Thomson*, 2 Rich. Eq. 30; *Baker*, 1 Bail. Eq. 165; *Leftwick v. Hamilton*, 9 Heisk. 310, 313; *Bradley v. Emerson*, 7 Vt. 369, 371.

7 *Leftwick v. Hamilton*, 9 Heisk. 316, 313.

8 *Harper v. Whitehead*, 33 Ga. 138, 144; *ante*, § 437.

9 *Towner*, 7 How. Pr. 387.

10 *Garlick v. Strong*, 3 Paige, 440; *Willis v. Underhill*, 6 How. Pr. 396. Consult *ante*, § 439; *post*, § 444.

11 *Bein v. Heath*, 6 How. 228, 240.

12 *Bradley v. Emerson*, 7 Vt. 369, 371.

13 *Leftwick v. Hamilton*, 9 Heisk. 310, 313; *Garlick v. Strong*, 3 Paige, 440.

14 *Bradley v. Emerson*, 7 Vt. 369, 371.

15 *Hunt v. Booth*, 1 Freem. Ch. 215; *Kenley*, 3 Miss. 751, 753; *ante*, § 433.

16 *Robert v. West*, 15 Ga. 122, 148.

- 17 Bellinger v. Thomson, 2 Rich. Eq. 30.
- 18 Blackwell v. Bragg, 78 Va. 529; *post*, §§ 460, 461.
- 19 Bein v. Heath, 6 How. 228, 230, 240; *post*, § 461.
- 20 Leftwick v. Hamilton, 9 Heisk. 310, 313. See Hopkins v. Neal, 2 Strange. 1026; Head. 3 Atk. 511; Witts v. Campbell, 12 Ves. 493; Pryor v. Ryburn, 16 Ark. 671; Kilpatrick v. Stozier, 67 Ga. 247; Humes v. Shillington, 22 Md. 346; Helms v. Franciscus, 2 Bland, 544; 20 Am. Dec. 402; Quinn v. Moss, 12 Smedes & M. 365; Colden v. Moore, 3 Edw. Ch. 311; 20 Cent. L. J. 230.
- 21 Browner v. Bell, 30 Ga. 334, 336.
- 22 Jordan v. Gray, 10 Ohio, 618.
- 23 Smith, 18 Fla. 789; Frazier v. White, 49 Md. 1, 8; Fox v. Tooke, 34 Mo. 503.
- 24 Herzberg v. Sachse, 60 Md. 426, 432; *ante*, § 438.

§ 441. Suits of married women alone. — 1. *Independently of statute.* At common law, a married woman could sue in her own name alone, in all cases where she had the capacities of a *femme sole*; <sup>1</sup> that is to say, (1) when her husband was presumed dead; <sup>2</sup> (2) when he was civilly dead; <sup>3</sup> (3) when he was an alien residing abroad; <sup>4</sup> (4) when he had permanently abandoned her and the State; <sup>5</sup> and (5) when he had been divorced from her *a vinculo matrimonii*, <sup>6</sup> or *a mensa et thoro*. <sup>7</sup> But her husband joined though she sued in a representative capacity, <sup>8</sup> and his mere consent could not enable her to sue alone, for husband and wife cannot by agreement destroy their personal status. <sup>9</sup> Nor could she sue alone in other cases in courts of equity, on account of the question of costs. <sup>10</sup>

2. *Under statutes.* In many States statutes expressly provide that married women may sue alone generally or in special cases; and usually the construction of such statutes involves no particular difficulties. <sup>11</sup> The authority to sue alone in one class of cases does not, however, affect the procedure in other cases; <sup>12</sup> the statute in this respect must be strictly construed. <sup>13</sup> A statute authorizing a married woman to sue alone as to her "separate estate" has been held to apply only to

statutory separate property.<sup>14</sup> As to the implied powers of married women to sue alone there is more difficulty. A statute enabling a wife to make contracts as if sole impliedly authorizes her to sue alone thereupon.<sup>15</sup> A statute making her a *femme sole* as to her separate property, with the sole control thereof, enables her to sue alone respecting it,<sup>16</sup> in replevin, for example.<sup>17</sup> When a married woman is absolutely entitled to the proceeds of a right of action,<sup>18</sup> it is said that she may sue alone.<sup>19</sup> When she is empowered to sue alone, most cases hold that it is error to join her husband,<sup>20</sup> though there are also cases to the contrary;<sup>21</sup> if the husband has any actual interest he may of course join.<sup>22</sup>

1 *Ante*, §§ 331-338; *Stewart M. & D.* §§ 174, 175, 177, 192, 322, 430, 449, 452, 469, 474, 475. See *Clark v. Valentine*, 41 Ga. 143, 145; *Love v. Moynehan*, 16 Ill. 279, 282; *Burger v. Belsley*, 45 Ill. 72, 74; *Smith v. Silence*, 4 Iowa, 321, 324; *Laughlin v. Eaton*, 54 Me. 157, 159; *Worthington v. Cooke*, 52 Md. 297, 308; *Gregory v. Pierce*, 4 Met. 478, 479; *Gregory v. Paul*, 15 Mass. 31, 32; *Rose v. Bates*, 12 Mo. 30; *Osborn v. Nelson*, 59 Barb. 375; *Benadum v. Pratt*, 1 Ohio St. 400, 405; *Fallwickle v. Keith*, 1 Heisk. 360, 361; *Cole v. Seeley*, 20 Vt. 220; 60 Am. Dec. 258; *Hawes Partles*, § 63.

2 *Smith v. Silence*, 4 Iowa, 321, 324; *Stewart M. & D.* § 474.

3 *Bradley v. Emerson*, 7 Vt. 369, 370; *Stewart M. & D.* § 475.

4 *Gregory v. Paul*, 15 Mass. 31, 32; *supra*, n. 1.

5 *Love v. Moynehan*, 16 Ill. 279, 282; *Stewart M. & D.* §§ 174, 175; *supra*, n. 1; *ante*, § 332.

6 *Webster*, 58 Me. 140, 145; 4 Am. Rep. 253; *Motley v. Sawyer*, 34 Me. 540, 542; *Berry v. Teel*, 12 R. I. 267, 268; *Stewart M. & D.* §§ 430, 449.

7 *Benadum v. Pratt*, 1 Ohio St. 400, 405; *Stewart M. & D.* §§ 430, 449.

8 *Buck v. Fischer*, 2 Colo. T. 709; *ante*, § 439.

9 *Beach*, 2 Hill, 260, 261; 38 Am. Dec. 584; *Stewart M. & D.* § 181.

10 *Harper v. Whitehead*, 33 Ga. 138, 144; *ante*, §§ 437, 440.

11 See *McConeghy v. McCaw*, 31 Ala. 447; *Guttman v. Scammell*, 7 Cal. 455; *Allen v. Eldridge*, 1 Colo. 288; *Wilkins v. Miller*, 9 Ind. 100, 101; *Kramer v. Conger*, 16 Iowa, 434; *Pancoast v. Burnell*, 32 Iowa, 394; *Dickson v. Randal*, 19 Kan. 212; *Furrow v. Chapin*, 13 Kan. 107; *Hadley v. Brown*, 2 Kan. 416; *Davis v. Herrick*, 37 Me. 397; *Tunks v. Grover*, 57 Me. 586, 588; *Fowle v. Tidd*, 15 Gray. 94, 95; *Burke v. Cole*, 97 Mass. 114, 115; *Spencer v. St. Paul*, 22 Minn. 29; *Boal v. Morgner*, 46 Mo. 48, 50; *Cooper v. Alger*, 51 N. H. 172, 175; *Sigel v. Johns*, 58 Barb. 620, 622; *Darby v. Callaghan*, 16 N. Y. 73.

12 *Gerald v. McKenzie*, 27 Ala. 166, 170.

13 See *ante*, § 16.

14 *Gerald v. McKenzie*, 27 Ala. 166, 170.

15 Reynand v. Memphis, 7 Baxt. 279.

16 Emerson v. Clayton, 32 Ill. 493, 497; Gibson, 43 Wis. 23, 26; 28 Am. Rep. 527. See Beavers v. Bancum, 33 Ark. 722; Meriwether v. Smith, 44 Ga. 541, 543; Forbes v. Tuckerman, 115 Mass. 115, 118; Nininger v. Commissioners, 10 Minn. 133; Boal v. Morgner, 46 Mo. 48; Hawes Parties, § 66.

17 Waterson v. Matteson, 4 R. I. 539.

18 See *post*, § 447.

19 Anderson v. Friend, 71 Ill. 475, 477.

20 Hayner v. Smith, 63 Ill. 430, 432. See Rockwell v. Clark, 41 Conn. 534; Stampoffski v. Hooper, 75 Ill. 242, 245; Tuttle v. Chicago, 42 Iowa, 568; Alexander v. Goodwin, 54 N. H. 423, 424; Whidden v. Coleman, 47 N. H. 237; Cooper v. Alger, 51 N. H. 172; Harris v. Webster, 58 N. H. 481; Tantum v. Coleman, 26 N. J. Eq. 128; Palmer v. Davis, 28 N. Y. 242; *ante*, § 438.

21 Windsor v. Bell, 61 Ga. 671, 676; *ante*, § 433.

22 Hayner v. Smith, 63 Ill. 430, 432; Henry v. Gregory, 29 Mich. 68, 69.

§ 442. The causes of action on which married women may sue.—The cause of action on which a suit of a married woman is brought may be an antenuptial or postnuptial injury to or contract with her, or a chose in action assigned to her before or after her marriage, and it may concern herself or her property; or the suit may be for relief respecting her property, general or separate. The mode of procedure in each case is elsewhere separately discussed;<sup>1</sup> it depends very largely on the substantial rights of husband and wife,<sup>2</sup> and therefore differs with circumstances and with respect to different kinds of property.

<sup>1</sup> See titles in index.

<sup>2</sup> See *ante*, § 429.

§ 443. The defenses in suits brought by married women.—The defense of the woman's coverture is, of course, a defense peculiar to married women's suits;<sup>1</sup> her disabilities to some extent affect the defense of limitations;<sup>2</sup> and the fact of her husband's joinder to some degree complicates the principles relating to the defense of set-off.<sup>3</sup> As to other defenses there seem to be no points peculiar to suits of married women.



1 Discussed *post*, § 444.

2 Discussed *post*, § 445.

3 See *McMahon v. Burchell*, 5 Hare, 322; 3 Hare, 97; *Elibank v. Montohen*, 5 Ves. 737; *Carr v. Taylor*, 10 Ves. 574; *Gordon*, 1 Glen & J. 347; *Ranking v. Barnard*, 5 Madd. 32; *Johnson v. King*, 20 Ala. 270; *Wingate v. Parsons*, 4 Del. Ch. 117, 122; *Carver*, 53 Ind. 241, 244; *Hanrahan v. Leclercq*, 15 La. An. 204, 205; *Lane v. Fallen*, 16 Md. 352, 357; *Carpenter v. Leonard*, 5 Minn. 155; *Pierce v. Dustin*, 24 N. H. 117; *Mollan v. Griffith*, 3 Paige, 402; *Ferguson v. Lothrop*, 15 Wend. 625; *Jamison v. Brady*, 6 Serg. & R. 466; 9 Am. Dec. 460; *Murray v. Williamson*, 3 Binn. 135; *Fick v. Hake*, 6 Watts, 131; *Roberts v. Adams*, 2 S. C. 337, 343; *Kennedy v. Badgett*, 19 S. C. 591, 594; *Hubby v. Campbell*, 22 Tex. 582, 583.

§ 444. The plea of coverture against married women. — If the married woman has a right of action, but pursues the wrong remedy, as if she sues alone when her husband,<sup>1</sup> or her trustee or next friend,<sup>2</sup> should be joined, her coverture must be set up by a plea in abatement,<sup>3</sup> or if her coverture appears on the face of the pleadings by demurrer;<sup>4</sup> and in the absence of such plea or demurrer the objection is waived and cannot be made at all.<sup>5</sup> If she sues jointly with a man who apparently has no interest, and does not allege their marriage, the declaration is demurrable;<sup>6</sup> so if, though the marriage be alleged, the interest of the wife and her right to sue do not affirmatively appear, the declaration is demurrable;<sup>7</sup> and in such cases the defect is not cured by verdict.<sup>8</sup> But if the wife has no right of action at all, the defendant may have a nonsuit;<sup>9</sup> and if this is apparent on the pleadings, it is fatal on demurrer,<sup>10</sup> or in arrest of judgment, or on error.<sup>11</sup> Of course, if the wife has the right to sue alone and so sues, a plea of coverture is bad.<sup>12</sup>

1 *Ross v. Linder*, 12 S. C. 592.

2 *Kenley*, 3 Miss. 751, 753; *infra*, n. 3.

3 *Dutton v. Rice*, 53 N. H. 406, 499. S. P., *Packet v. Clough*, 20 Wall. 528, 539; *Chirac v. Reinicker*, 11 Wheat. 280, 303; *James v. Stewart*, 9 Ala. 855; *Kimbrow v. First*, 1 McAr. 61, 66; *Young v. Ward*, 21 Ill. 223, 225; *Dickinson v. Trout*, 8 Bush, 441, 443; *Walker v. Gillman*, 45 Me. 28, 30; *Winslow v. Gilbreth*, 49 Me. 578; *Hayden v. Attleboro*, 7 Gray, 338, 343; *Kenley*, 3 Miss. 751, 753; *Simmons v. Thomas*, 43 Miss. 31; 5 Am. Rep. 470; *Bell v. Consolidated*, 32 N. J. L. 102; *Dillaye v. Parks*, 31 Barb. 132; *Newton v. Robinson*, 1 Tayl.

72, 75; *Sheidle v. Weishlee*, 16 Pa. St. 134, 138; *Surtell v. Brailsford*, 2 Bay. 333, 338; *Quarrier v. Baltimore*, 20 W. Va. 424.

<sup>1</sup> *Mott v. Smith*, 16 Cal. 533; *Tissot v. Throckmorton*, 6 Cal. 471, 473; *Tapley* 10 Minn. 448; *Kenley*, 3 Miss. 751, 753.

<sup>5</sup> *Chirac v. Reinicker*, 11 Wheat. 230, 303; *Kenley*, 3 Miss. 751, 753; *Surtell v. Brailsford*, 2 Bay. 333, 338; *Ross v. Linder*, 12 S. C. 592; *supra*, n. 3.

<sup>6</sup> *Tanner v. White*, 15 Ala. 798.

<sup>7</sup> *Hyatt v. Cochran*, 85 Ind. 231; *Williams v. Brainard*, 52 Vt. 392; *ante*, ‡ 431, n. 2.

<sup>8</sup> *Smith v. New England*, 45 Conn. 416.

<sup>9</sup> *Dutton v. Rice*, 53 N. H. 496, 499. S. P., *James v. Stewart*, 9 Ala. 855; *Kimbrow v. First*, 1 McAr. 61, 66; *Newton v. Robinson*, *Tayl.* 72, 76.

<sup>10</sup> See *Kenley*, 3 Miss. 751, 753; *supra*, n. 4; *infra*, n. 11.

<sup>11</sup> *Kimbrow v. First*, 1 McAr. 61, 66.

<sup>12</sup> *Farmian v. Chamberlain*, 74 Ind. 82, 83.

‡ 445. **Plea of limitations against married women.**—Although long delay may raise a *prima facie* presumption of payment independently of statute,<sup>1</sup> the plea of limitations as an absolute bar depends entirely on statute;<sup>2</sup> and Statutes of Limitation are of equal force in equity and at law.<sup>3</sup> By the British statute of James,<sup>4</sup> and most of the American statutes based upon it,<sup>5</sup> a special saving is made in favor of married women, so that as a general rule a married woman is not barred from prosecuting a right which accrues during coverture, by any lapse of time occurring before the dissolution of her marriage.<sup>6</sup> Thus, when a party acquires property from a husband during coverture, the wife of such husband is not barred from claiming the property as hers by any lapse of time before his death;<sup>7</sup> and against a wife who lends money to her husband, limitations begin to run only from the date of his death or divorce.<sup>8</sup> In the statutes of Iowa, Missouri, New York, and Wisconsin, there seem to be no saving clauses in favor of married women;<sup>9</sup> in Massachusetts the saving clause operates only if the wife is "under disability";<sup>10</sup> in California,<sup>11</sup> Indiana,<sup>12</sup> and Kentucky,<sup>13</sup> only if she cannot sue alone, and in West Vir-

ginia, cases in which she can sue alone are excepted from the saving operation of the clause.<sup>14</sup> But whether statutes enabling married women to sue alone by implication repeal the saving clause in the Statute of Limitation, is disputed: on the one hand it is held that when a wife can sue as if unmarried, the reason for the exception is gone, and therefore the exception can no longer exist;<sup>15</sup> while it is on the other hand maintained that the privileges of married women can be removed only by express legislation, and that their safety from limitations secured by the general statute must continue to exist until expressly taken away.<sup>16</sup> In coming to a determination on this point, the language of the particular statutes is of course of great importance.<sup>17</sup> A statute which excepts persons "under legal disabilities," excepts married women so far as they are under disabilities only.<sup>18</sup> Coverture is not, however, the only ground for exception under the statutes; infancy is another common one; and a married woman cannot tack one of these disabilities to another.<sup>19</sup> Thus, if an infant with a right of action marries, the statute begins to run in spite of her coverture, when she comes of full age,<sup>20</sup> and so when limitations have not run against a married woman on account of her coverture, and she dies, her heirs cannot set up their infancy as a further reason why the statute should not run.<sup>21</sup> But if, when the right accrues, the woman is both married and an infant, the statute begins to run only when both of the disabilities are removed.<sup>22</sup> If the statute once begins to run, no subsequently incurred disability can stop it;<sup>23</sup> therefore a wife is not saved from the operation of the statute if she had the right of action at the time of her marriage;<sup>24</sup> and so, if her right accrues during coverture, and her husband dies, the statute begins to run on the day of

his death, and does not stop when she marries again.<sup>25</sup> The plea of limitations can be set up only by the parties or those claiming under them.<sup>26</sup> The saving in favor of a married woman does not prevent limitations from running against her husband<sup>27</sup> or her assignees;<sup>28</sup> the husband's delay may bar his right to the estate during coverture, and to curtesy;<sup>29</sup> and in case of her death, if he has curtesy, the statute does not run against her heirs until the estate of curtesy has terminated.<sup>30</sup> Limitations do not run in favor of a husband's heirs against his widow's claim for dower.<sup>31</sup>

1 See *Piatt v. Smith*, 12 Ohio St. 561, 671; *Meanor v. Hamilton*, 27 Pa. St. 137, 143.

2 See *Hodges v. Darden*, 51 Miss. 199, 201.

3 *Powers v. Kutz*, 40 Pa. St. 90, 94.

4 Alex. Brit. Stats. p. 446.

5 These statutes should be consulted: See R. I. R. S. 1882, pp. 446, 456; Tex. R. S. 1879, §§ 3201, 3222; *Bush v. Lindsey*, 14 Ga. 687, 689.

6 *Meegan v. Boyle*, 19 How. 130, 150; *Sledge v. Clopton*, 6 Ala. 580, 606; *Mechan v. Wyatt*, 21 Ala. 813, 835; *Drenner v. Walker*, 21 Ark. 539, 545; *Flynt v. Hatchett*, 9 Ga. 328, 333; *Taylor v. Shemwell*, 4 Mon. B. 575, 578; *Fatheree v. Fletcher*, 31 Miss. 265, 271; *Burke v. Beveridge*, 11 Minn. 205, 211; *McLane v. Moore*, 6 Jones, 520, 523; *McLean v. Jackson*, 12 Fred. 149, 150; *Towers v. Hagner*, 3 Whart. 48, 60; *Jones v. Reeves*, 6 Rich. 132, 137; *Murdock v. Johnson*, 7 Cold. 605, 619; and other cases in this section.

7 *Jones v. Reeves*, 6 Rich. 132, 137.

8 *Towers v. Hagner*, 3 Whart. 48, 60. Consult *Bradley v. Sadler*, 54 Ga. 681, 686; *Oswald v. Hoover*, 43 Md. 360, 368; *Fletcher v. Updike*, 3 Hun, 350.

9 *Valle v. Ovenhouse*, 62 Mo. 82, 89; *Acker*, 81 N. Y. 143, 148; *Wood Limit.* ‡ 240, p. 482.

10 *Wood Limit.* ‡ 240, p. 482.

11 *Cameron v. Smith*, 50 Cal. 303, 304; *Wilson*, 36 Cal. 447, 450.

12 *Banman v. Grubbs*, 26 Ind. 419, 421.

13 *Masterson v. Marshall*, 5 Dana, 412, 414, 415.

14 *Wood Limit.* ‡ 240, p. 482.

15 *Geisen v. Heiderich*, 104 Ill. 537, 540; *Enos v. Buckley*, 94 Ill. 458; *Haywood v. Gunn*, 82 Ill. 355, 391; *Castner v. Walrod*, 83 Ill. 171, 176; 25 Am. Rep. 369; *Brown v. Cousens*, 51 Me. 301, 306; *Dunham v. Sage*, 52 N. Y. 230.

16 *Morrison v. Norman*, 47 Ill. 477, 481; *Ball v. Bullard*, 52 Barb. 145, 146; *Weisner v. Zaun*, 39 Wis. 188, 208-210; *Westcott v. Miller*, 42 Wis. 454, 464.

17 See *Bush v. Lindsey*, 14 Ga. 687, 689.

18 *Banman v. Grubbs*, 26 Ind. 419, 421.

19 *Blackwell v. Bragg*, 78 Va. 529, 536. See *Carter v. Cantrell*, 16 Ark. 154, 164; *Henny v. Carson*, 59 Pa. St. 297, 308.

20 *Carter v. Cantrell*, 16 Ark. 154, 164; *supra*, n. 19.

21 *Henny v. Carson*, 59 Pa. St. 297, 308.

22 *Blackwell v. Bragg*, 78 Va. 529, 536.

23 *Carter v. Cantrell*, 16 Ark. 154, 164; *Welborn v. Weaver*, 17 Ga. 267, 270; *Masterson v. Marshall*, 5 Dana, 412, 415; *Thorpe v. Corwin*, 29 N. J. L. 311, 314; *Becton v. Alexander*, 27 Tex. 659, 669.

24 *Welborn v. Weaver*, 17 Ga. 267, 270.

25 *McDonald v. McGuire*, 8 Tex. 361, 365.

26 *State v. Layton*, 4 Har. (Del.) 8, 19; *Watson v. Kelly*, 16 N. J. L. 517, 524.

27 *Neal v. Robinson*, 2 Dana, 86, 88; *McDowell v. Potter*, 8 Pa. St. 189, 194; 49 Am. Dec. 503.

28 *Thompson v. Peebles*, 6 Dana, 387, 390.

29 *Murdoch v. Johnson*, 7 Cold. 605, 609.

30 *Marple v. Myers*, 12 Pa. St. 122, 127.

31 *Webb v. Smith*, 40 Ark. 17, 24; *McWhirter v. Roberts*, 40 Ark. 283.

§ 446. *Special proceedings by married women.*—Although courts of equity are said to have a special jurisdiction over married women, this does not mean that married women may proceed in equity as married women, where an unmarried person would have to proceed at law. Suits in which married women are concerned are so often brought in equity because they relate to equitable separate property—to an equitable title.<sup>1</sup> But when a married woman has the full legal title and the right to sue at law, she cannot seek equity's protection for her property in cases where equity would not relieve an unmarried woman.<sup>2</sup> On the other hand, though authorized to sue at law respecting her statutory separate estate, she could not sue at law if her title thereto were merely equitable.<sup>3</sup> She must proceed against her husband in equity;<sup>4</sup> but usually, if she can sue, she must choose her remedy as if sole.<sup>5</sup>

1 See *ante*, §§ 210, 211.

2 *Frazier v. White*, 49 Md. 1, 8. See *Kneeland v. Fuller*, 51 Me. 518.

3 *Bolling v. Mock*, 35 Ala. 727, 730.

4 *Porter v. Bank*, 19 Vt. 410, 417; *ante*, §§ 53, 433.

5 See *Dent v. Slough*, 40 Ala. 518, 524.

§ 447. The ownership of the proceeds of married women's suits.—That all choses in action are property seems quite well settled, though some question has been raised as to choses in action in tort.<sup>1</sup> And therefore, such choses fall within the provisions of separate *property* acts; they are property;<sup>2</sup> they are property acquired in any manner;<sup>3</sup> but, of course, a wife's right of action for a wrong to her is not property acquired by gift, grant, devise, bequest, etc.<sup>4</sup> At common law, where the husband had a substantial right in his wife's choses in action, a judgment obtained in their joint names, if reduced, went to the husband alone as personalty in possession, but if not reduced to possession before the husband's death, survived to the wife.<sup>5</sup> Under statutes securing a wife's choses in action to her separate use, though judgment be obtained in the joint names of husband and wife, he has no substantial interest in it—no attachable interest, for example.<sup>6</sup> Still, to prevent this question from arising, a married woman should never sue jointly with her husband, when she has the authority to sue by next friend or alone.

1 Discussed *ante*, §§ 219, 229, 230.

2 Boston, 32 Md. 212, 224; *ante*, § 219.

3 Chicago v. Dunn, 52 Ill. 260, 263; *ante*, § 250.

4 Hemp v. Clark, Md. Law Rec. Feb. 28, 1885.

5 *Ante*, §§ 176, 183, 311.

6 Hemp v. Clark, Md. Law Rec. Feb. 23, 1885.

### ARTICLE III.—SUITS AGAINST MARRIED WOMEN.

§ 448. Modes in which married women may be sued.

§ 449. Suits jointly with husband.

§ 450. Suits with trustee or next friend.

§ 451. Suits against married women alone.

§ 452. The service of process.

§ 453. The causes of action.

§ 454. The defenses.

§ 455. The plea of coverture by married women.

§ 456. The plea of limitations by married women.

§ 437. Effect of judgment against married women.

§ 438. The execution, etc., of the judgment.

§ 450. Special proceedings against married women.

### § 448. The modes in which married women may be sued.

—Under different laws and circumstances suits have been brought properly against married women in the following modes: (1) Jointly with husband; (2) jointly with trustee; and (3) alone. The first was the invariable mode at common law, not only because the husband was jointly liable with the wife on all her contracts and torts,<sup>1</sup> but because he had present substantial interests in all her property which might be affected by the suit.<sup>2</sup> The second was the mode when the wife had a trustee of equitable separate property.<sup>3</sup> The third was the mode in which a wife with the capacities of a *femme sole* was sued, and is the usual mode under the statutes.<sup>4</sup>

1 *Whitman v. Delano*, 6 N. H. 543, 545; *Prescott v. Fisher*, 22 Ill. 390, 393; *ante*, §§ 66, 67; *post*, § 449. Consult *Hawes Parties*, §§ 68-70.

2 See *ante*, §§ 137, 141, 163.

3 See *ante*, §§ 202, 210, 211; *post*, § 450.

4 *Post*, § 451. Compare *ante*, § 438.

§ 449. Suits against wife jointly with husband. — As a rule, independently of statute, whether at law or in equity (except as to equitable separate estate, of which there is a third party trustee, and in which the husband has no rights<sup>1</sup>), the husband has to be joined in all suits against his wife.<sup>2</sup> He was joined at common law even in suits against her as executrix.<sup>3</sup> The grounds of her liability must be distinctly alleged.<sup>4</sup> In equity she could, by leave of court, answer separately;<sup>5</sup> but he had full control of the suit at law.<sup>6</sup> A joint demurrer might be sustained as to her alone.<sup>7</sup> Under the statutes he is usually joined when he is liable,<sup>8</sup> and not when he is not liable;<sup>9</sup> but in some States he must be made a formal party.<sup>10</sup> He should be joined in possessory actions against the wife,<sup>11</sup> because her possession is his possession.<sup>12</sup>

1 See *ante*, §§ 202, 210, 211; *post*, § 450.

2 *Marshall v. Oakes*, 51 Me. 308; *Porter v. Bank*, 19 Vt. 410, 417; *ante*, § 431; *Hawes Parties*, § 68. Because he was jointly liable. *Ante*, §§ 66, 67.

3 *Ludlow v. Marsh*, 3 N. J. L. 983; *ante*, § 66.

4 *Gaylord v. Payne*, 4 Conn. 190.

5 *Perine v. Swaine*, 1 Johns. Ch. 24; *post*, § 461. See *Schmidt v. Postel*, 63 Ill. 58.

6 *Vick v. Pope*, 81 N. C. 22, 26; *post*, § 460.

7 *Wooden v. Morris*, 3 N. J. Eq. 65.

8 *Robinson v. Trofitter*, 109 Mass. 478; *ante*, §§ 66, 67.

9 *Hugebrush v. Ragland*, 78 Ill. 400; *Carothers v. McNese*, 43 Tex. 221.

10 Md. Act 1880, ch. 253, §§ 31, 32; *Cook v. Ligon*, 54 Miss. 372; *Hamlin v. Bridge*, 24 Me. 145.

11 *Howard v. Valentine*, 20 Cal. 282.

12 Discussed *ante*, §§ 119-121.

## § 450. Suits against the wife jointly with trustee.—

Whenever there is a trustee, he should be joined in suits affecting the property;<sup>1</sup> if no trustee is named, the husband is joined as such.<sup>2</sup> When the wife answers separately, she generally acts by her next friend.<sup>3</sup> If she is an infant, with separate property and a distinct defense, a guardian *ad litem* should be appointed.<sup>4</sup>

1 *Palmer v. Rankins*, 30 Ark. 771; *ante*, §§ 202, 211.

2 See *Fears v. Brooks*, 12 Ga. 135, 197; *ante*, §§ 202, 211.

3 *Wolf v. Banning*, 3 Minn. 202; *Phillips v. Burr*, 4 Duer, 113; *post*, § 462.

4 *Nicholson v. Wilborn*, 13 Ga. 467.

## § 451. Suits against married women alone.—

Independently of statute, a married woman can be sued alone only in cases in which by the common law she enjoyed the status of a *femme sole*;<sup>1</sup> only when her husband (1) was presumed dead;<sup>2</sup> or (2) civilly dead;<sup>3</sup> or (3) an alien residing abroad;<sup>4</sup> or (4) had permanently abandoned her and the State;<sup>5</sup> or (5) was divorced from her.<sup>6</sup> Even in suits in equity her husband had to be joined, unless she had a trustee.<sup>7</sup> In many States, statutes expressly authorizing suits against married women alone have been passed;<sup>8</sup> and statutes which



destroy her husband's common-law liability on her torts and contracts, or enable her to incur liabilities unknown at common law, impliedly authorize suits against her alone,<sup>9</sup> unless they provide that the husband shall be joined as a formal party.<sup>10</sup>

1 *Worthington v. Cooke*, 52 Md. 297, 308; *Gregory v. Paul*, 15 Mass. 31, 32, 34; *ante*, §§ 332-337.

2 *Smith v. Silence*, 4 Iowa, 321, 324; *Stewart M. & D.* § 474.

3 *Worthington v. Cooke*, 52 Md. 297, 308; *Stewart M. & D.* § 475.

4 *Gregory v. Paul*, 15 Mass. 31, 33, 34.

5 *Love v. Moynehan*, 16 Ill. 279, 282; *Stewart M. & D.* §§ 174, 175.

6 *Stewart M. & D.* §§ 430, 449.

7 *Porter v. Bank*, 19 Vt. 410, 417; *ante*, §§ 449, 450.

8 Compare *ante*, § 441.

9 *Morrell v. Cawley*, 17 Abb. Pr. 353; *ante*, § 425.

10 Md. Acts 1880, ch. 253, §§ 31, 32; *ante*, § 449

§ 452. **The service of process on married women.**—At common law, a married woman sued jointly with her husband did not have to be summoned personally—service on her husband was sufficient<sup>1</sup>—unless the proceeding was one affecting her separate property.<sup>2</sup> If the husband has complete control of the suit he can admit summons for her, otherwise not.<sup>3</sup> It has been held that one copy of the summons left at the family residence is sufficient summons for both husband and wife,<sup>4</sup> and that they are presumed to have the same residence.<sup>5</sup> As personal service is necessary only to give personal jurisdiction,<sup>6</sup> it has been held that service on a married woman is not necessary when the proceeding is one *in rem* against her separate property—a case of attachment.<sup>7</sup> Service on a wife is not, however, service on her husband.<sup>8</sup>

1 *Hollinger v. Bk.* 8 Ala. 605; *Lord v. Strong*, 1 Root, 475; *King v. McCampbell*, 6 Blackf. 435, 436; *Jordan v. Anderson*, 29 La. An. 749, 750; *Ferguson v. Smith*, 2 Johns. Ch. 139, 140; *Nicholson v. Cox*, 83 N. C. 44, 47; 35 Am. Rep. 556; *infra*, n. 2.

2 *Piggott v. Snell*, 59 Ill. 106, 108; *Smith v. Taylor*, 11 Ga. 20, 22; *Moore v. Wade*, 8 Kan. 380, 385; *Kepp v. Hanna*, 2 Bland, 26; *Kerchner v. Kempton*, 47 Md. 568, 590; *Powers v. Totten*, 42 N. J. L. 442, 445; *Foote v. Lathrop*, 53 Barb. 183, 185; *Eckerson v. Vollmer*, 11

H. & W. — 55.

How. Pr. 42, 43; *Leavitt v. Cruger*, 1 Paige, 421, 422; *Vick v. Pope*, 81 N. C. 22, 25; *Shelby v. Perrin*, 18 Tex. 515, 517; *supra*, n. 1.

3 *Moore v. Wade*, 8 Kan. 380, 385; *Nicholson v. Cox*, 83 N. C. 44, 47; 35 Am. Rep. 556.

4 *Lord v. Strong*, 1 Root, 475.

5 *Prieto v. Duncan*, 22 Ill. 26; *ante*, §§ 20, 60.

6 *Moore v. Wade*, 8 Kan. 380, 385.

7 *Brent v. Taylor*, 6 Md. 58, 69.

8 *Hess v. Cole*, 23 N. J. L. 116, 123.

‡ 453. The causes of action on which married women may be sued.—At common law, a married woman was liable to be sued only on her antenuptial contracts or torts, and on her postnuptial torts which she voluntarily committed;¹ on such causes of action, judgment could be obtained against her jointly with her husband, and any property of hers could be seized in execution.² In equity her equitable separate estate could be made liable by a proceeding *in rem* against it for all sums of money which she had properly, in accordance with the rule prevailing in the particular State, charged upon it.³ Under statutes, she may render herself and her property liable on her contracts,⁴ and the only difficulty as to the procedure in such cases is whether the suit shall be brought at law or in equity, and whether the proceeding shall be *in personam* or *in rem*.⁵ When the contract is binding on statutory separate estate only because such property is treated as if it were secured to the woman by deed instead of by statute, the proceeding must be in equity and *in rem*, just as if it were equitable separate property.⁶ But when the contract is made under the express or implied powers given by the terms of the statute, the proceeding should be at law as if she were sole;⁷ except that when the contract is valid only by virtue of a power attached to an ownership of property, the operation of the judgment must be limited to such property.⁸

1 See *ante*, §§ 66, 67, 421–425.

2 *Zachary v. Cadenhead*, 40 Ala. 236; *post*, ‡ 458.

3 See *ante*, §§ 206, 207, 211.

4 Discussed *ante*, §§ 363-373.

5 See *ante*, §§ 237-239, 370-373.

6 See *Grissell*, Law R. 12 Ch. D. 484; *Stillwell v. Adams*, 29 Ark. 346, 351; *Carpenter v. Mitchell*, 50 Ill. 470, 474; *Jones v. Crosthwaite*, 17 Iowa, 393, 403, 404; *Worthington v. Cooke*, 52 Md. 237, 308; *Devries v. Conklin*, 22 Mich. 253, 254, 260; *Schiaforth v. Ambs*, 46 Mo. 114, 120, 121; *Pawley v. Vogel*, 42 Mo. 291, 302; *Pemberton v. Johnson*, 46 Mo. 342, 344; *Walker v. Deaver*, 79 Mo. 664, 674; *Vankirk v. Skillman*, 34 N. J. L. 109; *Johnson v. Cummings*, 16 N. J. Eq. 97, 105, 106; *Williams v. Carroll*, 2 Hilt. 438, 440; *Dougherty v. Sprinkle*, 88 N. C. 300, 302; *Phillips v. Graves*, 20 Ohio St. 371, 382; 5 Am. Rep. 675; *Kavanaugh v. O'Neill*, 53 Wis. 101, 106.

7 *Cookson v. Toole*, 50 Ill. 519, 521; *Leonard v. Rogan*, 20 Wis. 546, 542. See *Richmond v. Tibbles*, 26 Iowa, 476; *Van Metre v. Wolf*, 47 Iowa, 345; *Miner v. Pearson*, 16 Kan. 23; *Guishaber v. Hairman*, 2 Bush, 320; *Cary v. Dixon*, 51 Miss. 601; *Griffin v. Reagan*, 52 Miss. 81; *Smith v. Deming*, 61 N. Y. 251; *Conway v. Smith*, 13 Wis. 137; *ante*, §§ 237, 239, 373.

8 See *Baldwin v. Kimmel*, 16 Abb. Pr. 353, 361.

§ 454. The defenses of married women.—The peculiar defense of married women is, of course, the defense of coverture.<sup>1</sup> The fact of coverture in some cases affects the defense of limitations;<sup>2</sup> and the fact that the husband is joined sometimes raises the question as to how far a defense of one will be available to the other.<sup>3</sup> The wife's bankruptcy, for example, discharges both her husband and herself from liability for her debts,<sup>4</sup> while his bankruptcy discharges him alone.<sup>5</sup> As to other defenses, there are no special points relating to married women, except as far as the management of the suit is concerned.<sup>6</sup>

1 Discussed *post*, § 455.

2 Discussed *post*, § 456.

3 See *Floor v. Steigelmayer*, 76 Ind. 473, 481; *State v. Layton*, 4 Har. (Del.) 8, 19; *McDowell v. Potter*, 8 Pa. St. 183, 194; 49 Am. Dec. 503.

4 *Chadwick v. Starrett*, 27 Me. 141.

5 *Jones v. Glass*, 43 Iowa, 345, 346; *Allers v. Forbes*, 59 Md. 374, 376.

6 Discussed *post*, §§ 460-463.

§ 455. The plea of coverture by married women.—If a married woman is sued on an obligation on which she is not liable at all, she may, if the defect is apparent on

the pleadings, demur;<sup>1</sup> or she may plead her coverture in bar,<sup>2</sup> or prove it under the general issue,<sup>3</sup> or set it up after judgment on a writ of error, or a motion to set the judgment aside;<sup>4</sup> and it has been even held that a judgment obtained in such a case against a married woman is a mere nullity, and may be so treated in collateral proceedings.<sup>5</sup> The plaintiff cannot cure the defect in his proceedings by entering a *nolle prosequi* against the wife, except in the case of torts, because in a suit in contract recovery must be had against all or none.<sup>6</sup> If she is liable on the obligation, but is improperly sued, her husband, next friend, or trustee not being joined, she must set up her coverture by a plea in abatement<sup>7</sup> (which, of course, must be put in before any plea in bar<sup>8</sup>), or if the defect is apparent on the pleadings by demurrer;<sup>9</sup> and in the absence of such plea or demurrer the defense is waived and cannot be made at all.<sup>10</sup> It is, perhaps, from a failure to recognize the distinction between the cases where the married woman is liable and is improperly sued, and the cases where she is not liable at all, that the great difference of opinion as to the effect of a judgment against her has arisen.<sup>11</sup> When husband and wife are jointly sued for her tort, a plea of coverture is not sufficient, she must plead coverture, and the duress of her husband.<sup>12</sup> In cases where the plea is good at all, it may be made generally, for the complaint must set out the grounds of her liability,<sup>13</sup> and she need not negative them.<sup>14</sup> In some States she must sign her plea of coverture herself.<sup>15</sup> For at common law she could not appear by attorney,<sup>16</sup> but only in person.<sup>17</sup>

1 Leslie v. Harlow, 13 N. H. 518.

2 Kennard v. Sax, 3 Oreg. 263, 265.

3 Thomas v. Lowry, 60 Ill. 512, 515; Painter v. Weatherford, 1 Greene, 97, 103.

4 Kennard v. Sax, 3 Oreg. 263, 266.

- 5 *Griffith v. Clarke*, 13 Md. 457, 463; *ante*, § 411; *post*, § 457.
- 6 *McLean v. Griswold*, 22 Ill. 218, 229; *Thomas v. Lowry*, 60 Ill. 512, 514.
- 7 *McLean v. Griswold*, 22 Ill. 218, 219; *Painter v. Weatherford*, 1 Greene, 97, 103; *Tracy v. Keith*, 11 Allen, 214, 215; *Powers v. Totten*, 42 N. J. L. 442, 445; *Kennard v. Sax*, 3 Oreg. 263, 265.
- 8 *Thomas v. Lowry*, 60 Ill. 512, 514.
- 9 *Long v. Dixon*, 55 Ind. 352, 354; *Gardner v. Moore*, 2 Edw. 313; *Hastings v. McKinley*, 1 Smith, E. D. 273.
- 10 *Work v. Cowhick*, 81 Ill. 317, 319; *Emmett v. Yandes*, 60 Ind. 548, 549; *Long v. Dixon*, 55 Ind. 352, 354; *Van Shrader v. Taylor*, 7 Mo. App. 361, 365; *Caldwell v. Brown*, 43 Tex. 216, 217.
- 11 See *post*, § 457; *ante*, § 411.
- 12 *Stockwell v. Thomas*, 76 Ind. 506, 508; *Burnett v. Nicholson*, 86 N. C. 99, 103; *Clark v. Bayer*, 32 Ohio St. 299, 311; 30 Am. Rep. 593; *ante*, § 66.
- 13 *Ante*, § 431, n. 2.
- 14 *Tracy v. Keith*, 11 Allen, 214, 215. Compare *Huff v. Wright*, 39 Ga. 41, 43, 44.
- 15 *Keddeslin v. Meyer*, 2 Miles, 235.
- 16 *Post*, § 462.
- 17 *Patton v. Stewart*, 19 Ind. 233, 237; *post*, § 462.

§ 456. **Plea of limitations by married women.**—When a married woman is sued, whether alone or not, limitations can in general be pleaded just as if the suit were against a person not under disability;<sup>1</sup> for statutes of limitation do not usually make any exception as to claims against married women.<sup>2</sup> And when a married woman is sued after coverture on an antenuptial debt, she can plead limitations, and neither her promise nor that of her husband made during coverture can be set up against her.<sup>3</sup> But as to family supplies, where she and her husband are jointly liable by statute,<sup>4</sup> he is her agent in law, and his promise may take the debt out of the statute.<sup>5</sup>

1 *Hodges v. Darden*, 51 Miss. 199, 201. But see *Hodgson v. Williamson*, Law R. 15 Ch. Div. 87, 92.

2 *Wood Limitations*, ch. 13, last clause.

3 *Farrar v. Bessey*, 24 Vt. 83, 92.

4 *Ante*, § 387.

5 *Lawrence v. Sinnamon*, 24 Iowa, 80, 84; *Polly v. Walker*, 60 Iowa, 66, 68; *Clopton v. Matheny*, 43 Miss. 285, 298.

§ 457. **Effect of judgment against a married woman.**—If the record in the case of a judgment against a married woman disclose the fact of her coverture, a cause of action on which a married woman might be liable,<sup>1</sup> the joinder of all proper parties,<sup>2</sup> and that the married woman has been duly summoned,<sup>3</sup> and if the subject-matter of the suit be one within the jurisdiction of the court,<sup>4</sup> the married woman is bound thereby as if unmarried.<sup>5</sup> If the record disclose the fact of coverture, but not grounds on which a married woman might be liable, the judgment is void, for the court has no jurisdiction to enter it;<sup>6</sup> if, though, it appears that the grounds of action were such as might render a married woman liable, but that the suit was not properly brought, the defect is cured, and the judgment is valid.<sup>7</sup> If the record do not disclose the fact of coverture, the married woman may in any proceeding show that owing to her coverture she was not liable at all,<sup>8</sup> but she cannot show that she was liable but was improperly sued.<sup>9</sup> Some cases hold more broadly, that in any case where the court had jurisdiction of the parties (by summons or appearance<sup>10</sup>) and of the subject-matter, the judgment is valid, and the wife estopped;<sup>11</sup> but the better rule is that a married woman is estopped only when the judgment is valid,<sup>12</sup> and that a judgment on a contract is itself but a contract, and not binding on a party not bound by the contract.<sup>13</sup> A void judgment may be enjoined in equity.<sup>14</sup> For example, a personal judgment against a married woman alone is valid, if the cause of action were a contract made by her as a *femme sole* trader;<sup>15</sup> but a personal judgment against a wife for the balance of a mortgage debt is not valid where she was not personally bound on the mortgage notes;<sup>16</sup> so a judgment on a void note was held absolutely void<sup>17</sup> by the same

court which recognized the binding force of a judgment against a married woman by default on a tort committed by her.<sup>18</sup> The cases cited in this section, and those cited in the sections on estoppel by record of married women,<sup>19</sup> process against married women,<sup>20</sup> and the plea of coverture by married women,<sup>21</sup> all of which bear on this subject, will be found to be irreconcilable. This section attempts to give credit to the different authorities for the truth which they respectively contain.

1 *Tracy v. Keith*, 11 Allen, 214, 215. See *ante*, § 453.

2 See *ante*, §§ 449-451.

3 *Childress v. Taylor*, 33 Ala. 185, 187; *Vick v. Pope*, 81 N. C. 22, 25. See *ante*, § 452.

4 See *Carey v. Dixon*, 51 Miss. 593, 600.

5 *Lewis v. Gunn*, 63 Ga. 542, 546; *Washburn v. Gouge*, 61 Ga. 512; *Emmett v. Yandes*, 60 Ind. 548, 550; *Carey v. Dixon*, 51 Miss. 593, 599; *Robinson v. Stadecker*, 59 Miss. 3; *Vosbrough v. Brown*, 66 Barb. 421, 422; *Baxter v. Dear*, 24 Tex. 17, 21.

6 *Emmett v. Yandes*, 60 Ind. 548, 549, 550; *Carey v. Dixon*, 51 Miss. 593, 599, 600; *Higgins v. Pelzer*, 49 Mo. 152, 157; *Hecker v. Hoak*, 88 Pa. St. 238, 242.

7 *Kennard v. Sax*, 3 Oreg. 263, 265; *ante*, § 455.

8 *Griffith v. Clarke*, 18 Md. 457, 463; *Morse v. Toppan*, 3 Gray, 411, 412. *Contra*, *Burk v. Hill*, 55 Ind. 412, 423; *infra*, p. 11.

9 *Long v. Dixon*, 55 Ind. 352, 354; *ante*, § 455.

10 *Childress v. Taylor*, 33 Ala. 185, 187; *Emmett v. Yandes*, 60 Ind. 548, 549; *Vick v. Pope*, 81 N. C. 22, 25; *Hecker v. Hoak*, 88 Pa. St. 238, 242; *ante*, § 452.

11 See *Gambette v. Brock*, 41 Cal. 78, 82, 83; *Wagner v. Ewing*, 44 Ind. 441, 443; *Burk v. Hill*, 55 Ind. 419, 421; *Van Meter v. Wolf*, 27 Iowa, 341, 344; 23 Iowa, 397, 404; 19 Iowa, 136; *Goothrie v. Howard*, 32 Iowa, 54, 56; *Howell v. Hale*, 5 Lea, 405, 410.

12 Discussed *ante*, § 411.

13 *Griffith v. Clark*, 18 Md. 457, 463; *Morse v. Toppan*, 3 Gray, 411, 412; *Griffin v. Rogan*, 52 Miss. 78, 81; *Higgins v. Pelzer*, 49 Mo. 152, 157; *Freeman Judgments*, § 149.

14 *Griffin v. Rogan*, 52 Miss. 78, 81; *Bowman v. Kaufman*, 30 La. An. 1021. An land sold under it may be recovered in ejectment: *Caldwell v. Walters*, 18 Pa. St. 79, 83; 55 Am. Dec. 592.

15 *Vosbrough v. Brown*, 66 Barb. 421, 422.

16 *Anderson v. Reed*, 11 Iowa, 177, 180; *Kirby v. Childs*, 10 Kan. 631, 644. *Aliter* if her property is liable: *McLaughlin v. O'Rourke*, 12 Iowa, 459, 461; *Rogers v. Weil*, 12 Wis. 664, 665.

17 *Griffith v. Clark*, 18 Md. 457, 463.

18 *Brown v. Kemper*, 27 Md. 666, 672.

19 *Ante*, § 411.

20 *Ante*, § 452.

21 *Ante*, § 453.

§ 458. **Property liable on judgment against a married woman.**—On any valid general judgment against husband and wife jointly, execution could formerly be issued against the bodies of them both,<sup>1</sup> and now can be issued against the property of them both,<sup>2</sup> except in such cases as those where the property of the wife is exempt by the terms of some statute or deed,<sup>3</sup> or where a statute expressly provides that the husband shall be only a formal party.<sup>4</sup> If the judgment is against the wife alone, her property alone is liable;<sup>5</sup> if the wife is not a party to the suit, her property is not liable at all.<sup>6</sup> The judgment may be by its terms a lien only on her statutory separate estate.<sup>7</sup>

1 *Hall v. White*, 27 Conn. 483; *Smith v. Taylor*, 11 Ga. 20, 23.

2 *Gray v. Thacker*, 4 Ala. 136; *Zachary v. Cadenhead*, 40 Ala. 236; *Ellis v. Clark*, 19 Ark. 420; *Bostic v. Love*, 16 Cal. 69; *Rennecker v. Scott*, 4 Greene, 185; *Travis v. Willis*, 55 Miss. 557; *Howard v. North*, 5 Tex. 200, 209; 51 Am. Dec. 769; *Cole v. Hurt*, 75 Va. 380; *Platner v. Patchin*, 19 Wis. 333.

3 *Clark v. Valentine*, 41 Ga. 143, 147.

4 See Md. Act 1880, ch. 253, §§ 31, 32.

5 This is self-evident.

6 *Phelps v. Morrison*, 24 N. J. Eq. 195, 199; *Read v. Allen*, 56 Tex. 182, 194.

7 See *Baldwin v. Kimmel*, 16 Abb. Pr. 353, 361.

§ 459. **Special proceedings against married women.**—In some States, special proceedings against married women are provided for by statute, as formerly in Maryland, where a special attachment law with reference to married women traders existed.<sup>1</sup> These special proceedings cannot be considered in this volume.

1 See Md. Act 1862, ch. 293, § 8; R. C. art. 51, § 23; *Odendhal v. Devlin*, 48 Md. 444; *Brent v. Taylor*, 6 Md. 59; *Crane v. Seymour*, 3 Md. Ch. 383; *Stewart & Carey H. & W. art. 65*.



# ARTICLE IV. — MANAGEMENT OF SUITS OF MARRIED WOMEN.

- § 460. The powers of the husband over the suit.
- § 461. The wife's separate suit, defense, etc.
- § 462. Married women's appointment of attorneys at law.
- § 463. Compensation of married women's attorneys.

§ 460. **The powers of a husband over his wife's suit.** — At common law, it must be remembered, a husband had the absolute right to reduce his wife's choses in action to possession,<sup>1</sup> and was liable with her on all her contracts<sup>2</sup> and for all her torts;<sup>3</sup> and as her legal existence was merged in his,<sup>4</sup> he was the active party in all suits in which they were both joined; she could not appoint an attorney,<sup>5</sup> or release errors,<sup>6</sup> or confess judgment,<sup>7</sup> she could only appear in person<sup>8</sup> and plead her coverture,<sup>9</sup> if that would do her any good. So that in all cases in which the common-law procedure has not been superseded, the husband employs counsel and pleads and manages the case for himself and his wife;<sup>10</sup> if they are plaintiffs, he can settle or dismiss the suit,<sup>11</sup> and is alone liable for the costs;<sup>12</sup> if they are defendants, he may allow the suit to go by default,<sup>13</sup> or suffer judgment to be entered in favor of the plaintiff,<sup>14</sup> and so long as there is no collusion between him and the plaintiff, the wife will be bound by his acts.<sup>15</sup> But his right to act for his wife in this way has been questioned in cases where she was insane.<sup>16</sup> At common law, if a husband neglected to prosecute his wife's rights of action, or released them, his loss was even greater than hers, for he had the immediate right to the enjoyment of them;<sup>17</sup> and if he allowed judgment to be obtained on her antenuptial contract,<sup>18</sup> or tort,<sup>19</sup> or on her postnuptial tort<sup>20</sup> (the only causes of action on which a judgment binding on her property could be

obtained<sup>21</sup>), the judgment was against himself as well ;<sup>22</sup> so that the control of the suit could be safely trusted to his charge. But as his said control of his wife's suits grows out of his substantial ownership of her rights of action, and his equal liability on her obligations,<sup>23</sup> it does not exist where his said rights and obligations do not exist, and disappears as they are removed. He could never, for example, through any suit of his, estop her from claiming property in which he had no rights by making her a co-complainant ;<sup>24</sup> nor could he, by allowing a judgment to be entered against them on a cause of action on which she was not liable, deprive her of her inheritance.<sup>25</sup> He cannot control her suits respecting her equitable or statutory separate estate,<sup>26</sup> unless by her consent and as her agent in fact ;<sup>27</sup> nor in such cases can he admit service for her.<sup>28</sup> When he is a mere nominal party, he is entitled to all her defenses.<sup>29</sup>

1 Rice v. McReynolds, 8 Lea, 36, 40 ; *ante*, § 176.

2 Prescott v. Fisher, 22 Ill. 330, 333 ; *ante*, § 67.

3 Marshall v. Oakes, 51 Me. 303, 303 ; *ante*, § 66.

4 Barron, 24 Vt. 375, 398 ; *ante*, §§ 39, 331.

5 Hubbard v. Barcus, 33 Md. 166, 174 ; *post*, § 462.

6 Breckenridge v. Coleman, 7 Mon. B. 331, 334.

7 Patton v. Stewart, 19 Ind. 233, 237 ; First v. Garlinghouse, 53 Barb. 65 ; Shalicross v. Smith, 81 Pa. St. 132, 133 ; *ante*, §§ 411, 451.

8 Patton v. Stewart, 19 Ind. 233, 237 ; Fox v. Tooke, 34 Mo. 501, 510 ; Phillips v. Burr, 4 Duer, 113, 115 ; Keddeslin v. Meyer, 2 Miles, 295.

9 Discussed *ante*, § 455.

10 Foxwist v. Tremaine, 2 Saund. 212, 213 ; Hayner v. Smith, 63 Ill. 430, 432 ; 14 Am. Rep. 124 ; English v. Roche, 6 Ind. 62 ; Ballard v. Russell, 33 Me. 196, 197 ; 54 Am. Dec. 620 ; Southworth v. Packard, 7 Mass. 95, 96 ; Wolf v. Banning, 3 Minn. 202, 204 ; Benjamin v. Bartlett, 3 Mo. 86, 87 ; Beach, 2 Hill, 260 ; Frazier v. Felton, 1 Hawks, 231, 237 ; Vick v. Pope, 81 N. C. 22, 26.

11 Ballard v. Russell, 33 Me. 196, 197 ; 54 Am. Dec. 620 ; Southworth v. Packard, 7 Mass. 95, 96 ; *ante*, §§ 76, 182.

12 Bellinger v. Thomson, 2 Rich. Eq. 30 ; *ante*, § 437.

13 Green v. Branton, 1 Dev. Eq. 500, 504.

14 Vick v. Pope, 81 N. C. 22, 26.

15 Beach, 2 Hill, 260 ; Green v. Branton, 1 Dev. Eq. 500, 504 ; Vick v. Pope, 81 N. C. 22, 26 ; *ante*, §§ 411, 457.

16 Stephens v. Porter, 11 Heisk. 341, 347.

- 17 Discussed *ante*, § 176.
- 18 Prescott v. Fisher, 22 Ill. 390, 393; *ante*, § 67.
- 19 Allen v. McCullough, 2 Heisk. 174, 182; 5 Am. Rep. 27; *ante*, § 66.
- 20 Marshall v. Oakes, 51 Me. 308, 309; *ante*, § 66.
- 21 *Ante*, § 453.
- 22 Brown v. Kemper, 27 Md. 666, 672; *ante*, §§ 66, 67.
- 23 See *ante*, § 429.
- 24 Danner v. Berthold, 11 Mo. App. 351, 369; Work v. Doyle, 3 Ind. 436.
- 25 See Work v. Doyle, 3 Ind. 436.
- 26 Kerchner v. Kempton, 47 Md. 568, 588; Travis v. Willis, 55 Miss. 557, 566; Frank v. Lilienfeld, 33 Gratt. 377, 378.
- 27 Keith, 26 Kan. 26, 36.
- 28 Rhoades v. Delaney, 50 Ind. 468, 471.
- 29 Floore v. Steigelmayer, 76 Ind. 479, 481.

§ 461. *Wife's separate suit, defense, etc.*—Courts of equity have always recognized the separate existence of wives,<sup>1</sup> and in all suits in which husband and wife are co-complainants or co-defendants, if they have separate and distinct interests, the bill or answer filed by the husband for both is regarded as *prima facie* the bill or answer of the husband alone, and the wife, if she requests it, is allowed to proceed separately.<sup>2</sup> As equitable separate estate is out of the control of the husband,<sup>3</sup> so are suits relating thereto; and the wife sues by her next friend, if she does not desire to join her husband, simply because the question of her liability for costs might arise if she sued alone.<sup>4</sup> If she does sue by her husband and allows him to act for her, she is bound,<sup>5</sup> but she is otherwise not bound by his declarations,<sup>6</sup> nor are his statements evidence against her.<sup>7</sup> If she files her separate answer by permission of court, she is bound by it;<sup>8</sup> her answer filed without permission may be taken from the files,<sup>9</sup> unless the court allows it *nunc pro tunc*.<sup>10</sup> As a general rule, under the statutes she has the right to sue and be sued, independently of her husband;<sup>11</sup> and just so far as her choses in action are made her statutory separate property can she control

the reduction of them to possession;<sup>12</sup> and just so far as his liability for her torts and contracts has been removed can she control suits against her.<sup>13</sup>

1 Rosenthal v. Mayhugh, 33 Ohio St. 155, 163; *ante*, §§ 33, 337.

2 See Kerchner v. Kempton, 47 Md. 568, 588; Warner v. Dove, 33 Md. 579, 584; Krone v. Linville, 31 Md. 138, 147; Wolf v. Banning, 3 Minn. 202, 204; Travis v. Wilks, 55 Miss. 557, 566; Fox v. Tooke, 34 Mo. 509, 510; Collard v. Smith, 13 N. J. Eq. 43, 45; Blackwell v. Bragg, 78 Va. 529; Frank v. Lillienfeld, 33 Gratt. 377, 378; Dandridge v. Minge, 4 Rand. 397.

3 Discussed *ante*, §§ 157-216.

4 Harper v. Whitehead, 33 Ga. 138, 144; *ante*, § 437.

5 Keith, 26 Kan. 26, 36.

6 Danner v. Berthold, 11 Mo. App. 351, 360; *infra*, n. 7.

7 Work v. Doyle, 3 Ind. 436; Kerchner v. Kempton, 47 Md. 568, 588; Warner v. Dove, 33 Md. 579, 584; Krone v. Linville, 31 Md. 138, 147; Bird v. Davis, 14 N. J. Eq. 467, 479; Frank v. Lillienfeld, 33 Gratt. 377, 378.

8 Krone v. Linville, 31 Md. 138, 147; Kerchner v. Kempton, 47 Md. 568, 588; Wolf v. Banning, 3 Minn. 202, 204.

9 Wolf v. Banning, 3 Minn. 202, 204; Collard v. Smith, 13 N. J. Eq. 43, 45.

10 See Krone v. Linville, 31 Md. 138, 147.

11 See *ante*, §§ 440, 441, 450, 451.

12 Becton v. Selleck, 48 Ala. 226, 229; Alderson v. Bell, 9 Cal. 315; Thomas v. Desmond, 63 Cal. 426, 427; Travis v. Wilks, 55 Miss. 557, 566; Dolloff v. Curran, 59 Wis. 352, 355; *post*, § 462; *ante*, §§ 440, 441, 460.

13 Lowe v. Redgate, S. C. Ohio, Nov. 18, 1884; 20 Cent. L. J. 76; *post*, § 462; *ante*, §§ 450, 451, 460.

§ 462. Appointment of attorney at law by married women. — At common law, a married woman could not appoint an attorney at law;<sup>1</sup> her antenuptial appointment was revoked by marriage;<sup>2</sup> she could not appear in a suit by attorney;<sup>3</sup> her plea or answer filed by an attorney was worthless;<sup>4</sup> a judgment entered against her on her warrant of attorney was a nullity;<sup>5</sup> her agreement for alimony made by her attorney was void.<sup>6</sup> In equity and under statutes, speaking generally, she may appoint an attorney at law whenever she has interests separate from her husband,<sup>7</sup> with respect to which she needs legal assistance and advice, or with respect to which she can act by agent generally.<sup>8</sup> She

can appoint an attorney to take care of litigation respecting her equitable separate property.<sup>9</sup> Under statutes expressly authorizing her to make an attorney or to contract generally, she can of course appoint an attorney.<sup>10</sup> And statutes authorizing her to sue independently of her husband,<sup>11</sup> or to contract with respect to her property,<sup>12</sup> or securing to her the separate enjoyment of her property,<sup>13</sup> by implication, give her the power to appoint an attorney to take charge of such suit or such property; it is necessary to the enjoyment of rights that one should be able to prosecute and defend them.<sup>14</sup> In all cases where she can appoint an attorney, she is bound by his acts as an unmarried woman would be;<sup>15</sup> by his laches,<sup>16</sup> his withdrawal of pleas,<sup>17</sup> his settlement or dismissal of suit;<sup>18</sup> and she is also bound to compensate him.<sup>19</sup> A statute, however, which gives a married woman the power to appoint an attorney does not, of itself, destroy the husband's substantial rights in her *choses in action*.<sup>20</sup>

1 Griffith v. Clark, 18 Md. 464, 467; Hubbard v. Barcus, 38 Md. 166, 174; Kerchner v. Kempton, 47 Md. 563, 533; Whitmore v. Delano, 6 N. H. 543, 546; First v. Garlinghouse, 53 Barb. 615; Phillips v. Burr, 4 Duer, 113, 114; *post*, § 463, n. 30; *ante*, § 406.

2 Wright, 2 Har. (Del.) 49; Templeton v. Cram, 5 Me. 417, 418.

3 Fox v. Tooke, 34 Mo. 509, 510.

4 Phillips v. Burr, 4 Duer, 113, 114; Kiddeslin v. Meyer, 2 Miles, 295.

5 Henchman v. Roberts, 2 Har. (Del.) 74; Patton v. Stewart, 19 Ind. 233, 237; Button v. Wilder, 6 Hill, 242; First v. Garlinghouse, 53 Barb. 615; Shallcross v. Smith, 81 Pa. St. 132, 133; Stevens v. Dubarry, Minor, 379.

6 Wallingsford, 6 Har. & J. 485, 489.

7 See Kerchner v. Kempton, 47 Md. 563, 533; Travis v. Willis, 55 Miss. 557, 566; *ante*, § 461.

8 See *ante*, §§ 84-83, 364.

9 Major v. Symmes, 19 Ind. 117, 118, 119; Porter v. Haley, 55 Miss. 66, 63; King v. Mittalberger, 50 Mo. 182, 185.

10 See Myers v. Griffiths, 11 Rich. 560, 564.

11 Stevens v. Reed, 112 Mass. 515, 517; Porter v. Haley, 55 Miss. 66, 70; 30 Am. Rep. 502; Powers v. Totten, 42 N. J. L. 442, 445.

12 Owen v. Cawley, 36 N. Y. 600, 605; *ante*, § 372.

H. & W. — 56.

13 *Major v. Symmes*, 19 Ind. 117, 120; *Porter v. Haley*, 55 Miss. 66, 69; 30 Am. Rep. 502; *Powers v. Totten*, 42 N. J. L. 442, 445; *Leonard v. Rogan*, 20 Wis. 540, 542; *ante*, ‡ 373.

14 *Powers v. Totten*, 42 N. J. L. 442, 445; *supra*, n. 13.

15 See *Glover v. Moore*, 60 Ga. 189, 192; *Keith*, 26 Kan. 26, 36; *Hollingsworth v. Harman*, 83 N. C. 153, 155; *Cayce v. Powell*, 20 Tex. 767, 771.

16 *Cayce v. Powell*, 20 Tex. 767, 771.

17 *Glover v. Moore*, 60 Ga. 189, 192.

18 *Hollingsworth v. Harman*, 83 N. C. 153, 155; *supra* n. 17

19 Discussed *post*, ‡ 463.

20 *Myers v. Griffis*, 11 Rich. 560, 564.

‡ 463. **Compensation of married women's attorneys.**—An attorney who has acted on behalf of a married woman may look for his fees, (1) to her husband, or (2) to her trustee or next friend, or (3) to her property or herself.

1. *Her husband's liability.* Since a wife always sued and was sued jointly with her husband at common law,<sup>1</sup> and since he employed counsel for them both,<sup>2</sup> the payment of the fees naturally fell upon him. But when he by his conduct made it necessary for her to take proceedings against him, the question arose whether he was not liable for the expenses of the suit as necessities.<sup>3</sup> It has been held that when a wife sues out a peace warrant against her husband,<sup>4</sup> or defends herself against a similar proceeding by him,<sup>5</sup> or when she sues for a separate maintenance,<sup>6</sup> her legal expenses are necessities for which her husband is liable. So her expenses in bringing or defending a divorce suit are held to be necessities in England,<sup>7</sup> Georgia,<sup>8</sup> Iowa,<sup>9</sup> Kansas,<sup>10</sup> and Maryland,<sup>11</sup> while the contrary is the rule in Alabama,<sup>12</sup> Connecticut,<sup>13</sup> Illinois,<sup>14</sup> Indiana,<sup>15</sup> Kentucky,<sup>15</sup> Massachusetts,<sup>17</sup> New Hampshire,<sup>18</sup> Ohio,<sup>19</sup> Tennessee,<sup>20</sup> and Vermont.<sup>21</sup> Even where such expenses may be necessities they are not necessarily so; there must be a reasonable ground for bringing the suit, or some real defense in resisting it.<sup>22</sup> Besides, the

courts provide for counsel fees in divorce cases under their jurisdiction to award alimony, etc.<sup>23</sup>

2. *Her trustee's or next friend's liability.* The trustee of a married woman's separate property may employ an attorney, and though himself personally bound to compensate him,<sup>24</sup> he may repay himself out of the estate.<sup>25</sup> So the reason for the existence of a next friend is that there may be a person responsible for the expenses of the suit; and in those cases where a married woman sues by next friend he is liable for the counsel fees.<sup>26</sup>

3. *Her liability, personal and as to her property.* At common law, as a general rule, a married woman could make no contract at all,<sup>27</sup> and could not appear by attorney in a suit,<sup>28</sup> unless he were appointed by her husband;<sup>29</sup> and therefore her contract to pay counsel fees was absolutely void,<sup>30</sup> and she could not even, according to the better settled rule, ratify such a contract after the dissolution of her marriage.<sup>31</sup> But if an attorney collected moneys belonging to her, he could keep a reasonable amount thereof as compensation for his services,<sup>32</sup> though he could not have recovered anything in any kind of suit against her.<sup>33</sup> She could, however, charge her equitable separate estate in equity for fees, just as she could charge it for any other debt of hers,<sup>34</sup> provided she complied with the rule prevailing in the particular State as to the mode in which the charge had to be made<sup>35</sup>—for example, that the contract was made with express reference to her said estate or was for its benefit,<sup>36</sup> and provided that the property sought to be charged was property over which she had the power of disposition.<sup>37</sup> Under a statute authorizing a married woman to contract generally, there is no reason why she should not contract for counsel fees;<sup>38</sup> and when she is authorized to contract with respect to

her property, a contract for legal services respecting the same would be valid.<sup>39</sup> So would a similar contract be authorized by implication by a statute securing her property to her separate use and control.<sup>40</sup> So by implication, a statute authorizing her to sue and be sued alone, empowers her to employ counsel to represent her.<sup>41</sup> Whether when she may employ counsel she binds herself personally or binds only her property, and whether her obligation is to be enforced in equity or at law, are unsettled questions, contracts for counsel fees being governed in this respect by the same rules as other contracts.<sup>42</sup> When a wife is liable for family expenses, how far counsel fees are a family expense must depend on the particular circumstances of the case.<sup>43</sup>

1 Porter v. Bank, 19 Vt. 410, 417; *ante*, §§ 431, 433, 443.

2 Frazier v. Felton, 1 Hawks, 231, 237; *ante*, § 460.

3 See *ante*, §§ 81, 95; Stewart M. & D. §§ 133, 389, 455.

4 Shepherd v. Mackoul, 3 Camp. 326, 327; Stewart M. & D. § 389. Or for restitution of conjugal rights: Wilson v. Ford, Law R. 3 Ex. 63.

5 Warner v. Heiden, 28 Wis. 517, 519; 9 Am. Rep. 515; Stewart M. & D. § 389.

6 Williams v. Monroe, 13 Mon. B. 514, 518.

7 Ottawa v. Hamilton, Law R. 3 C. P. D. 393, 397, 399; Hooper, 33 Law J. N. S. Ch. 300, 305; 2 DeGex, J. & S. 91; Stocken v. Patrick, 29 Law T. N. S. 507; Wilson v. Ford, Law R. 3 Ex. 63; Rice v. Shepherd, 12 Com. B. N. S. 332, 333; Brown v. Ackroyd, 5 El. & B. 819, 827, 829; 25 Law J. Q. B. 193; 34 Eng. L. & Eq. 214, 217.

8 Glenn v. Hill, 59 Ga. 94, 96; Sprayberry v. Merk, 30 Ga. 81, 82.

9 Porter v. Briggs, 38 Iowa, 166; 18 Am. Rep. 27. Compare Johnson v. Williams, 3 Greene, 97, 99.

10 Gossett v. Patten, 23 Kan. 340, 342.

11 Handy v. McCurley, 62 Md. 422; 19 Cent. L. J. 253, 254.

12 Parsons v. Darrington, 32 Ala. 227, 235.

13 Shelton v. Pendleton, 18 Conn. 417, 433; Cooke v. Newell, 40 Conn. 536, 538.

14 Dow v. Eyster, 79 Ill. 254, 256.

15 McCullough v. Robinson, 2 Ind. 630.

16 Williams v. Monroe, 13 Mon. B. 514, 517, 518.

17 Coffin v. Durham, 8 Cush. 404, 405.

18 Morrison v. Holt, 42 N. H. 478, 480; Ray v. Adden, 50 N. H. 82, 84, 85; 9 Am. Rep. 175.



- 19 Dorsey v. Goodenow, Wright, 120.
- 20 Thompson 3 Head, 527, 529.
- 21 Wing v. Hurlburt, 15 Vt. 607, 615; 49 Am. Dec. 695.
- 22 Handy v. McCurley, 62 Md. 422; 19 Cent. L. J. 253; Brown v. Ackroyd, cited *supra*, n. 7.
- 23 Dow v. Eyster, 79 Ill. 254, 255; Stewart M. & D. § 389.
- 24 See Gill v. Carmine, 55 Md. 339, 342.
- 25 Noyes v. Blakeman, 3 Sand. 531, 544.
- 26 See Harper v. Whitehead, 33 Ga. 133, 144; *ante*, § 437.
- 27 Norris v. Lantz 18 Md. 269, 269; *ante*, §§ 253, 333.
- 28 Phillips v. Burr, 4 Duer, 113, 115; *ante*, §§ 460, 462.
- 29 Frazier v. Felton, 1 Hawks, 221, 237; *ante*, §§ 460, 461.
- 30 See Draiz v. Hogan, 50 Cal. 121, 128; Pierce v. Osman, 75 Ind. 259, 260; Putnam v. Tennyson, 50 Ind. 456, 458; Thompson v. Warren, 8 Mon. B. 488, 491; Porter v. Haley, 55 Miss. 66, 70; 30 Am. Rep. 502; Musick v. Dodson, 76 Mo. 624, 625; 43 Am. Rep. 780; Whipple v. Giles, 55 N. H. 139, 149; Wilson v. Burr, 25 Wend. 386, 383; Davis v. Burnham, 27 Vt. 562, 568.
- 31 Musick v. Dodson, 76 Mo. 624, 625; 43 Am. Rep. 780; *ante*, §§ 366, 368.
- 32 Thompson v. Warren, 8 Mon. B. 488, 491.
- 33 See Davis v. Burnham, 27 Vt. 562, 568.
- 34 Pirshing v. Falsh, 87 Ill. 260, 262; Major v. Symmes, 19 Ind. 117, 118, 119; Porter v. Haley, 55 Miss. 66, 69; 30 Am. Rep. 501; King v. Mittalberger, 59 Mo. 182, 185; Owen v. Cawley, 42 Barb. 165, 118; 36 N. Y. 600, 605; Wilson v. Burr, 25 Wend. 386, 388; Davis v. Burnham, 27 Vt. 562, 568; *ante*, §§ 206, 207.
- 35 Rules stated *ante*, § 206.
- 36 See Major v. Symmes, 19 Ind. 117, 119; cases *supra*, n. 34.
- 37 Cozzens v. Whitney, 3 R. I. 79, 83; Pierce v. Osman, 75 Ind. 259, 260; *ante*, § 206.
- 38 See *ante*, § 371.
- 39 See Pirshing v. Falsh, 87 Ill. 260, 262; Owen v. Cawley, 36 N. Y. 600, 605; *supra*, n. 34.
- 40 Major v. Symmes, 19 Ind. 117, 118; Porter v. Haley, 55 Miss. 66, 69; 30 Am. Rep. 501; Powers v. Totten, 42 N. J. L. 442, 445; Leonard v. Rogan, 20 Wis. 540, 542; *ante*, § 373.
- 41 Stevens v. Reed, 112 Mass. 515, 517. See Glover v. Moore, 60 Ga. 189, 192; Powers v. Totten, 42 N. J. L. 442, 445; *ante*, § 462.
- 42 Compare Major v. Symmes, 19 Ind. 117, 120, with Leonard v. Rogan, 20 Wis. 540, 542. See *ante*, §§ 211, 372, 379, 453; *post*, § 476.
- 43 Fitzgerald v. McCarty, 55 Iowa, 702, 705; *ante*, § 387.

## CHAPTER XXVII.

### MARRIED WOMEN TRADERS.

ART. I. SOURCES OF CAPACITY TO TRADE, §§ 464-472.

II. INCIDENTS OF CAPACITY TO TRADE, §§ 473-481.

#### ARTICLE I. — SOURCES OF CAPACITY TO TRADE.

- § 464. Sources of capacity to trade, generally.
- § 465. Definitions—earnings, trade, business, etc.
- § 466. Capacity when husband is civilly dead, etc.
- § 467. Capacity by custom.
- § 468. Capacity in equity.
- § 469. Capacity by husband's consent.
- § 470. Capacity under statutes—Separate property acts.
- § 471. Capacity under statutes—Express and implied authority.
- § 472. Capacity under statutes—Special requirements.

§ 464. Sources of married women's capacity to trade, generally.—The use of the words "trade" and "married woman trader" has been vague, and it is necessary, in a discussion of this subject, to bear in mind the different elements which may be involved in the capacity of a married woman to trade.

1. *At common law, generally.* A married woman could make no contract whatever;<sup>1</sup> all her time and labor belonged to her husband,<sup>2</sup> as did all the present enjoyment of her property;<sup>3</sup> she had, in fact, no legal existence apart from her husband;<sup>4</sup> therefore she could not trade at all.<sup>5</sup> If a female trader married, the trade became her husband's,<sup>6</sup> and if she had been trading as partner, the partnership was dissolved by her marriage.<sup>7</sup>

2. *Her earnings.* As a married woman could not contract at all by the common law, she could not enter

into any kind of engagement or employment on her own account, but all her time, services, wages, and earnings of every kind belonged to her husband.<sup>8</sup> Still her husband could agree that she should have her earnings, just as he could invest her with any property of his, and his agreement would be enforced in equity ;<sup>9</sup> his agreement, however, gave her no personal capacity, but only the right to collect and keep the wages and rewards of her labors.<sup>10</sup> So by statute, in most States, the wife's earnings are secured to her separate use.<sup>11</sup> These statutes were passed to protect wives from shiftless, improvident, and dissipated husbands,<sup>12</sup> and were in form the earliest of the statutes relating to the trade of married women.

3. *The increase of her separate property.* Although at common law all the interest, profits, rents, and increase of a married woman's property vested in the husband just as the property itself did, except that the rents and profits of real estate vested in him as personally,<sup>13</sup> she had her separate estate first in equity and then by statute, and the increase of such estate was also separate property ;<sup>14</sup> and therefore the products of all investments or uses of her separate property were her separate property, though such products were partly due to her efforts, and to the labor, skill, and knowledge of her husband.<sup>15</sup> In a sense, therefore, she could trade with her separate property.<sup>16</sup>

4. *Resulting capacities.* Although when a married woman's earnings or property are secured to her separate use, as above stated, the profits of her business or trade may be her separate property also,<sup>17</sup> her personal incapacity to enter into trade is not necessarily removed ;<sup>18</sup> for equity recognizes her capacities only in connection with her property,<sup>19</sup> and mere property acts do not affect personal status.<sup>20</sup> So that to trade in

the wider sense, a married woman must either have the capacities of a *femme sole*,<sup>21</sup> or be expressly authorized to enter into business.<sup>22</sup>

5. *Summary of sources.* So that a married woman may be found on her own account earning money, trading or in business (and the meaning of these words must be specially defined<sup>23</sup>) by virtue (1) of her right to her earnings, depending on her husband's agreement<sup>24</sup> or on statute;<sup>25</sup> or (2) of her ownership of equitable<sup>26</sup> or statutory<sup>27</sup> separate property; or (3) of her capacities as a *femme sole*, due to the peculiar conduct of her husband<sup>28</sup> or to statute;<sup>29</sup> or (4) of her capacities to trade, due to custom,<sup>30</sup> or to statute.<sup>31</sup> And her powers, rights, and liabilities, in any particular case, depend largely upon the sources whence she derives her capacity to trade.<sup>32</sup>

1 Norris v. Lantz, 18 Md. 260, 269; *ante*, §§ 357, 368.

2 Discussed *ante*, § 65.

3 Discussed *ante*, §§ 137, 141-183.

4 Discussed *ante*, §§ 38, 39, 331.

5 Carey v. Burruss, 20 W. Va. 571, 575; 43 Am. Rep. 790. See Bradstreet v. Baer, 41 Md. 19, 23; Nitterville v. Barber, 52 Miss. 168, 171; McKinnon v. McDonald, 4 Jones Eq. 1.

6 Ashworth v. Outram, Law R. 5 Ch. D. 923, 929.

7 Alexander v. Morgan, 31 Ohio St. 546, 550.

8 Discussed *ante*, § 65.

9 McLemore v. Pinkston, 31 Ala. 267, 269; *ante*, §§ 65, 87.

10 Uhrig v. Horstman, 8 Bush, 172, 177; Stewart M. & D. § 181; *post*, § 469.

11 Martin v. Robson, 65 Ill. 129, 135; 16 Am. Rep. 578; *ante*, § 65.

12 Youngworth v. Jewell, 15 Nev. 45, 47.

13 Discussed *ante*, §§ 137, 141-183.

14 Discussed *ante*, §§ 209, 227.

15 Wheeler v. Raymond, 130 Mass. 247, 248, 249; *ante*, §§ 87, 209, 227; *post*, §§ 468, 470.

16 See Mitchell v. Sawyer, 21 Iowa, 582, 583; *post*, §§ 468, 470.

17 Mitchell v. Sawyer, 21 Iowa, 582, 583; Hawkins v. Providence, 119 Mass. 596, 599; 20 Am. Rep. 353; Silveus v. Porter, 74 Pa. St. 448, 451; Meyers v. Rahte, 46 Wis. 655, 659; *post*, §§ 468-470.

18 Tuttle v. Hoag, 46 Mo. 38, 41; 2 Am. Rep. 481; *post*, §§ 468-470.

19 Discussed *ante*, §§ 206, 207, 211.

- 20 Discussed *ante*, §§ 15, 237, 370.
- 21 *Carey v. Burruss*, 20 W. Va. 571, 575; *post*, § 465.
- 22 *Guttman v. Scannell*, 7 Cal. 455, 459; *post*, §§ 470-472.
- 23 See *post*, § 465.
- 24 *Richardson v. Merrill*, 32 Vt. 27, 36; *post*, §§ 463, 469.
- 25 *Hawkins v. Providence*, 119 Mass. 596, 599; 20 Am. Rep. 353; *post*, § 471.
- 26 *Jarman v. Woolloton*, 3 Term, 618, 622; *post*, § 463.
- 27 *Mitchell v. Sawyer*, 21 Iowa, 532, 533; *post*, § 470.
- 28 *Carey v. Burruss*, 20 W. Va. 571, 575; *post*, § 465.
- 29 See *Frances v. Dickel*, 63 Ga. 255, 258; *Woodcock v. Reed*, 5 Allen, 207, 208; *post*, §§ 465, 471.
- 30 *Petty v. Anderson*, 2 Car. & P. 33, 39; *post*, § 467.
- 31 *Nash v. Mitchell*, 71 N. Y. 200, 203; 27 Am. Rep. 38; *post*, § 471.
- 32 Discussed *post*, §§ 473-481.

### § 435. Definitions — earnings, trade, business, etc. —

Although the difference between earnings and increase of property is clear,<sup>1</sup> and for this reason married woman's separate property acts do not destroy a husband's rights to his wife's personal services,<sup>2</sup> it is very hard to draw any line between earnings and the profits of trade.<sup>3</sup> The terms used in the books dealing with the subject of married women traders are not sharply defined, but a few definitions may be given.

1. *Earnings.* Earnings mean what is earned, gained, or merited by labor, services, or performances: wages or reward,<sup>4</sup> and the earnings secured to a married woman by a statute are not confined to the results of manual labor, to wages for washing or sewing, but include the products of her trade also,<sup>5</sup> if it is carried on with her separate property as capital;<sup>6</sup> and the stock in trade of a married woman owned at the time of her marriage, or afterwards bought with her earnings, is included in the term "earnings."<sup>7</sup>

2. *Trade and business.* Trade or business means an employment to the carrying on of which the party devotes a considerable portion of her time, skill, and means,<sup>8</sup> a business that is continuing in its nature

and embraces many transactions.<sup>9</sup> Engaging in trade and business means not only trading in a commercial sense, but also being engaged in other employments which require time, labor, and skill—time, attention, and labor.<sup>10</sup> Trading means engaging in a business pursuit, mechanical, manufacturing, or commercial.<sup>11</sup> Thus, though a single transaction may be a business one, it does not make the party a trader;<sup>12</sup> horse dealing may be a business, but a woman who buys or sells a single horse is not necessarily in that business;<sup>13</sup> so farming may be a business, but employing a man to work on one's farm does not make one a farmer by trade;<sup>14</sup> renting a house may be a business transaction and for the purpose of a business,<sup>15</sup> but a lease of rooms is not necessarily a contract by a trader;<sup>16</sup> so, a married woman's receipt and disbursement of her rents and profits, though done in a business way, does not constitute her a trader;<sup>17</sup> nor is she a trader when she is not acting generally with the public, but is simply taking care of her own property,<sup>18</sup> or collecting or investing<sup>20</sup> her income. When she may trade she is not confined to any particular trade: she may not only engage in washing,<sup>22</sup> sewing,<sup>23</sup> dressmaking,<sup>24</sup> millinery,<sup>25</sup> in keeping a dairy,<sup>26</sup> a boarding-house,<sup>27</sup> a grocery or provision store,<sup>28</sup> and in other pursuits specially adapted to her sex,<sup>29</sup> but she may be a farmer,<sup>30</sup> a miller,<sup>31</sup> an army sutler,<sup>32</sup> a saloon keeper<sup>33</sup> or tavern keeper,<sup>31</sup> a clothier,<sup>35</sup> an ironmonger,<sup>36</sup> she may work a mine or quarry,<sup>37</sup> or may go into the lumber business;<sup>38</sup> though if her trade is unsuited to her, this is a fact to be considered if her husband's creditors are trying to show that the business is really his.<sup>39</sup> So she may engage in the professions—may devote her talents to literature, acting, singing;<sup>40</sup> and, in fact, under a general power to trade, may follow any legitimate calling.<sup>41</sup>

3. *Separate trade.* The trade of a married woman is usually spoken of as her *separate* trade; the word "separate" refers rather to her status than to the mode in which she shall trade,<sup>42</sup> and it does not mean that she shall trade alone,<sup>43</sup> or prevent her living with her husband while trading,<sup>44</sup> or allowing him to join in the business.<sup>45</sup> In Massachusetts and Indiana it has, however, been held that she must keep her business separate from her husband,<sup>46</sup> and that their joint earnings are his property.<sup>47</sup> The effect of the mingling of the wife's with the husband's property has already been discussed.<sup>48</sup>

- 1 See *Mitchell v. Sawyer*, 21 Iowa, 582, 583; *ante*, § 464.
- 2 *Glover v. Alcott*, 11 Mich. 470, 480; *ante*, § 65.
- 3 See *Haight v. McVeagh*, 69 Ill. 624, 628; *Dayton v. Walsh*, 46 Wis. 113, 120; 32 Am. Rep. 757.
- 4 *Dayton v. Walsh*, 46 Wis. 113, 120; 32 Am. Rep. 757.
- 5 *Haight v. McVeagh*, 69 Ill. 624, 628.
- 6 See *Duress v. Horneffer*, 15 Wis. 195, 197; *post*, §§ 464, 470, 471.
- 7 *Lovell v. Newton*, Law R. 4 C. P. D. 7, 11, 12.
- 8 *Holmes*, 40 Conn. 117, 119.
- 9 *Holmes*, 40 Conn. 117, 119; *Proper v. Cobb*, 101 Mass. 589, 590.
- 10 *Netterville v. Barber*, 52 Miss. 168, 171.
- 11 *Nash v. Mitchell*, 71 N. Y. 200, 203; 27 Am. Rep. 38.
- 12 *Holmes*, 40 Conn. 117, 119; *Netterville v. Barber*, 52 Miss. 168, 171.
- 13 *Holmes*, 40 Conn. 117, 120; *Proper v. Cobb*, 104 Mass. 589, 590.
- 14 *Holmes*, 40 Conn. 117, 120.
- 15 *Knowles v. Hull*, 99 Mass. 562, 564.
- 16 *Holmes*, 40 Conn. 117, 119.
- 17 *Proper v. Cobb*, 104 Mass. 589, 590; *Nash v. Mitchell*, 71 N. Y. 200, 203; 27 Am. Rep. 38.
- 18 *Proper v. Cobb*, 104 Mass. 589, 590.
- 19 *Nash v. Mitchell*, 71 N. Y. 200, 203; 27 Am. Rep. 38.
- 20 *Wheeler v. Raymond*, 130 Mass. 247, 248, 249.
- 21 *Guttman v. Scannell*, 7 Cal. 455, 459.
- 22 *Haight v. McVeagh*, 69 Ill. 624, 628.
- 23 *Haight v. McVeagh*, 69 Ill. 624, 628.
- 24 *Jassoy v. Delius*, 65 Ill. 469, 471; *Tuttle v. Hoag*, 46 Mo. 38, 40; 2 Am. Rep. 481.
- 25 *Tuttle v. Hoag*, 46 Mo. 38, 40; 2 Am. Rep. 481.
- 26 *Krouskop v. Shortz*, 51 Wis. 204, 205, 207.

- 27 Chapman v. Briggs, 11 Allen, 546, 547; Dawes v. Redier, 125 Mass. 421, 423; Harnden v. Gould, 126 Mass. 411, 412.
- 28 Haight v. McVeagh, 69 Ill. 624, 628; Abbey v. Deyo, 44 Barb. 374, 382.
- 29 Guttman v. Scannell, 7 Cal. 455, 459; *infra*, n. 41.
- 30 Camden v. Mullen, 29 Cal. 564, 565; Snow v. Sheldon, 126 Mass. 332, 333; 30 Am. Rep. 684; Ames v. Foster, 6 Allen, 136, 138; Abbey v. Deyo, 44 Barb. 374, 382; Krouskop v. Shontz, 51 Wis. 204, 205, 207. But see McDaniel v. Cornwall, 1 Hill (S. C.) 428, 429; *post*. ‡ 467.
- 31 Cooper v. Ham, 49 Ind. 393, 416.
- 32 See Swasey v. Antram, 24 Ohio St. 87, 95.
- 33 Porter v. Gamba, 43 Cal. 105, 108; Nispel v. Laparle, 74 Ill. 306, 307.
- 34 Silvens v. Porter, 74 Pa. St. 448, 449.
- 35 Guttman v. Scannell, 7 Cal. 455, 456; Bellows v. Rosenthal, 31 Ind. 116, 117.
- 36 Abbey v. Deyo, 44 Barb. 374, 382.
- 37 Netterville v. Barber, 52 Miss. 168, 172.
- 38 Netterville v. Barber, 52 Miss. 168, 172.
- 39 Guttman v. Scannell, 7 Cal. 455, 459.
- 40 Dayton v. Walsh, 46 Wis. 113, 120; 32 Am. Rep. 757.
- 41 Guttman v. Scannell, 7 Cal. 455, 459; Haight v. McVeagh, 69 Ill. 624, 628; Chapman v. Briggs, 11 Allen, 546, 547.
- 42 Zimmerman v. Erhard, 58 How. Pr. 11, 14.
- 43 *Post*, ‡ 480. But see Haas v. Shaw, 91 Ind. 384, 389, 396.
- 44 Lovell v. Newton, Law R. 4 C. P. D. 7, 12; Newbrick v. Dugan, 61 Ala. 251, 253; Parker v. Simonds, 1 Allen, 258, 260.
- 45 Guttman v. Scannell, 7 Cal. 455, 459; *post*, ‡ 480.
- 46 Lord v. Parker, 3 Allen, 127, 129; Haas v. Shaw, 91 Ind. 384, 389, 396.
- 47 Hawkins v. Providence, 119 Mass. 596, 599; 20 Am. Rep. 353. See *ante*, §§ 87, 129, 311.
- 48 *Ante*, §§ 129, 311.

‡ 466. **Married woman's capacity to trade when a *femme sole* by the common law.** — When a married woman's husband is civilly dead, has finally abandoned her, etc., she has by the common law the capacities of a *femme sole*,<sup>1</sup> and may trade as such.<sup>2</sup> In some States there are statutes to the same effect.<sup>3</sup> How far her husband's absence enables her to trade in his place has already been discussed.<sup>4</sup>

1 Worthington v. Cooke, 52 Md. 297, 307; *ante*, §§ 331-335.

2 Carey v. Burruss, 20 W. Va. 571, 575; 43 Am. Rep. 790.

3 Harmon v. Madden, 10 Bush, 664, 667; Woodcock v. Reed, 5 Allen, 207, 208.

4 See *ante*, ‡ 90.



§ 467. **Married women's capacity to trade by custom.**—By the custom of London, a married woman who carried on a trade separate and apart from her husband had to the extent of such trade all the capacities of a *femme sole*.<sup>1</sup> Such custom has never existed in the United States,<sup>2</sup> except to some extent in South Carolina.<sup>3</sup> The law recognized this custom not for the sake of wives, but to encourage trade and commerce, and therefore the custom did not apply, for example, to farming.<sup>4</sup> When trading under such a custom the wife could be a bankrupt;<sup>5</sup> but her suits were generally conducted jointly with her husband, for conformity.<sup>6</sup>

1 *Petty v. Anderson*, 2 Car. & P. 38, 39; *Beard v. Webb*, 2 Bos. & P. 93, 97; *Lavie v. Phillips*, 3 Burr. 1776, 1783; *Netterville v. Burber*, 52 Miss. 163, 171; *Carey v. Burruss*, 20 W. Va. 571, 575; 43 Am. Rep. 790; 2 Bright. H. & W. 77.

2 See *Jacobs v. Featherstone*, 6 Watts & S. 345, 346.

3 *McDaniel v. Cornwall*, 1 Hill (S. C.) 423, 429; *Newbiggin v. Pillans*, 2 Bay 163, 165; *Dial v. Neuffer*, 3 Rich. 78, 79.

4 *McDaniel v. Cornwall*, 1 Hill (S. C.) 423, 431.

5 *Lavie v. Phillips*, 3 Burr. 1776, 1783.

6 *Beard v. Webb*, 2 Bos. & P. 93, 97.

§ 468. **Married woman's capacity to trade in equity.**—In those States where a married woman is a *femme sole* as to her equitable separate estate,<sup>1</sup> she may use the same in trade, and the profits of such trade are equitable separate property likewise;<sup>2</sup> but in such trade she has no personal capacities;<sup>3</sup> equity recognizes her separate existence only with respect to her property,<sup>4</sup> and her contracts made in the course of her trade can be collected only if they have been properly charged on said property.<sup>5</sup>

1 Discussed *ante*, §§ 203, 205-207.

2 *Johnson v. Gallagher*, 3 DeGex, F. & J. 494, 509; *Jarman v. Woolloton*, 3 Term, 613, 622; *Conklin v. Doul*, 67 Ill. 353, 357; *Jenkins v. Flinn*, 37 Ind. 349, 352; *Stevens v. Reed*, 112 Mass. 515; *Penn v. Whitehead*, 17 Gratt. 503, 512, 513; *Partridge v. Stocker*, 36 Vt. 108, 113; *Carey v. Burruss*, 20 W. Va. 571, 579; *Todd v. Lee*, 16 Wis. 430, 433.

H. & W.—57.

3 Conklin v. Doul, 67 Ill. 355, 357; Tuttle v. Hoag, 46 Mo. 38, 41; 2 Am. Rep. 481; *supra*, n. 2.

4 Discussed *ante*, §§ 205, 211.

5 Todd v. Lee, 16 Wis. 480, 483; *supra*, n. 2.

§ 469. **Married woman's capacity to trade with husband's consent.**—A husband cannot, by his consent, change the personal status of his wife,<sup>1</sup> or enable her to trade with the capacities, rights, and liabilities of a *femme sole*;<sup>2</sup> but he may allow her as his agent to engage in business and give her the profits,<sup>3</sup> or he may agree before or after marriage that she shall keep her earnings or carry on business for her own use,<sup>4</sup> and give her, if he chooses, the necessary capital to start with.<sup>5</sup> Any such gift<sup>6</sup> of earnings, profits, or property to her is good against himself,<sup>7</sup> and his heirs, voluntary assigns, etc.,<sup>8</sup> but not as against his creditors,<sup>9</sup> unless on valuable consideration.<sup>10</sup> When a wife thus trades under a settlement from her husband, she trades in equity as with equitable separate property,<sup>11</sup> the business, profits, etc., are the husband's absolutely at law.<sup>12</sup> But if the business is really hers, and not carried on by her as his agent, he is not bound for his debts.<sup>13</sup> If his consent to her carrying on business is by mere oral assent, and without consideration, though he cannot ask back profits already made and collected by her,<sup>14</sup> he can revoke his consent, and claim the business as his own.<sup>15</sup> In all cases where she carries on business by his mere consent, the business is his, and he is liable for its debts,<sup>16</sup> and may claim its profits.<sup>17</sup> Whether the business is his or hers is a question of fact.<sup>18</sup> Her agency for him may be proved directly or indirectly.<sup>19</sup> But if a wife has engaged in business without authority of law, and without her husband's assent, he cannot be held liable for its debts,<sup>20</sup> nor can she on her mere personal contracts;<sup>21</sup> so if all the credit is given to her,

her husband is not liable, whether she or her property is liable or not.<sup>22</sup> Under the statutes usually, the husband's consent is not necessary to enable a wife to trade;<sup>23</sup> nor does his mere consent involve him in the liabilities of the business.<sup>24</sup>

- 1 Discussed *Stewart M. & D.* § 181; *ante*, §§ 348, 359.
- 2 *Uhrig v. Horstman*, 8 Bush, 172, 177.
- 3 *Ashworth v. Outram*, Law R. 5 Ch. 923, 931; *infra*, n. 7.
- 4 *Penn v. Whitehead*, 17 Gratt. 503, 512; *infra*, n. 7.
- 5 *Lockwood v. Cullin*, 4 Robt. 129, 136.
- 6 Gift from husband to wife: *Ante*, § 127.
- 7 *Jarman v. Woolloton*, 3 Term, 618, 622; *Ashworth v. Outram*, Law R. 5 Ch. 923, 931; *Oglesby v. Hall*, 30 Ga. 386, 390; *Jenkins v. Flinn*, 37 Ind. 349, 352; *Conklin v. Doul*, 67 Ill. 355, 357; *Fisk v. Cushman*, 6 Cush. 20, 24; *Cropsey v. McKinney*, 30 Barb. 47, 57; *Sammes v. McLaughlin*, 35 N. Y. 647, 650; *Penn v. Whitehead*, 17 Gratt. 503, 512; *Richardson v. Merrill*, 32 Vt. 27, 36; *Carey v. Burruss*, 20 W. Va. 571, 579; *Stimson v. White*, 20 Wis. 562, 563; cases *ante*, § 65.
- 8 *Richardson v. Merrill*, 32 Vt. 27, 36; *supra*, n. 7; *ante*, §§ 104, 127.
- 9 *Uhrig v. Horstman*, 8 Bush, 172, 176; *Cropsey v. McKinney*, 30 Barb. 47, 57; *McKinnon v. McDonald*, 4 Jones Eq. 1, 6; *ante*, §§ 115-118.
- 10 *Penn v. Whitehead*, 17 Gratt. 503, 512; *supra*, n. 7; *ante*, §§ 104-108.
- 11 *Penn v. Whitehead*, 17 Gratt. 503, 513; *ante*, § 463.
- 12 *Stimson v. White*, 20 Wis. 562, 563.
- 13 *Tuttle v. Hoag*, 46 Mo. 38, 41; 2 Am. Rep. 481; *post*, § 478.
- 14 See *Green v. Pollas*, 12 N. J. Eq. 267, 263; *Partridge v. Stocker*, 36 Vt. 108, 114; *ante*, § 127.
- 15 *Conklin v. Doul*, 67 Ill. 355, 357; *Stimson v. White*, 20 Wis. 562, 563.
- 16 *Barlow v. Bishop*, 1 East, 432, 434; *Godfrey v. Brooks*, 4 Har. (Del.) 396, 397; *Conklin v. Doul*, 67 Ill. 355, 357; *Jenkins v. Flinn*, 37 Ind. 349, 352; *Cropsey v. McKinney*, 30 Barb. 47, 57; *Barton v. Beer*, 35 Barb. 78, 79; *Switzer v. Valentine*, 4 Duer, 96, 99; *Swasey v. Antram*, 24 Ohio St. 87, 95; *Jacobs v. Featherstone*, 6 Watts & S. 347, 349; *Partridge v. Stocker*, 36 Vt. 108, 114; *ante*, § 93; *post*, § 478.
- 17 *Switzer v. Valentine*, 4 Duer, 96, 99; *Stimson v. White*, 20 Wis. 562, 563; *post*, § 478.
- 18 *Jarman v. Woolloton*, 3 Term, 618, 622; *Glover v. Alcott*, 11 Mich. 471, 479; *Abbey v. Deyo*, 44 N. Y. 343; *Partridge v. Stocker*, 36 Vt. 108, 113; *ante*, §§ 87, 93.
- 19 *Godfrey v. Brooks*, 5 Har. (Del.) 396, 397; *ante*, § 93.
- 20 *Happek v. Hartby*, 7 Baxt. 411, 414; *post*, § 478.
- 21 *Tuttle v. Hoag*, 46 Mo. 38, 41; 2 Am. Rep. 481; *Conklin v. Doul*, 67 Ill. 355, 358.
- 22 *Jenkins v. Flinn*, 37 Ind. 349, 352; *Tuttle v. Hoag*, 46 Mo. 38, 42; 2 Am. Rep. 481; *ante*, § 89.
- 23 See, however, *Uhrig v. Horstman*, 8 Bush, 172, 177.
- 24 See *Haight v. McVeagh*, 63 Ill. 624, 628; *post*, § 478.

‡ 470. **Married women's capacity to trade under separate property acts.** — Married women's separate property acts do not, by implication, destroy the husband's common-law right to his wife's earnings;<sup>1</sup> but they do usually, expressly or by implication, secure to the wife the natural increase of her property;<sup>2</sup> and since such increase belongs to her, even when largely due to her husband's efforts,<sup>3</sup> there seems to be no reason why her own services to it, though these belonged to her husband, should injuriously affect her rights.<sup>4</sup> When a married woman has no powers by statute independent of her property, her dealings with her statutory separate property in the way of trade must be subject to limitations of the same character as those which control her trading with her equitable separate estate.<sup>5</sup> She cannot, for example, under such a statute carry on a business on her personal credit.<sup>6</sup> Her right to manage her separate estate and her right to trade are quite distinct.<sup>7</sup> A contract for furniture to be used in a boarding-house which is her separate property,<sup>8</sup> or for horses for her livery stable,<sup>9</sup> may not be valid as the contracts of a trader, but valid as contracts with relation to her separate property.<sup>10</sup>

1 *Seitz v. Mitchell*, 94 U. S. 530, 534; *ante*, ‡ 63.

2 *Stout v. Perry*, 70 Ind. 501, 504; *ante*, ‡ 227.

3 *Aldridge v. Muirhead*, 101 U. S. 397, 399; *ante*, ‡ 87.

4 *See Mitchell v. Sawyer*, 21 Iowa, 582, 583.

5 *See O'Dally v. Morris*, 31 Ind. 111, 112; *Todd v. Lee*, 16 Wls. 480, 483; *ante*, §§ 370, 371, 468.

6 *Glover v. Alcott*, 11 Mich. 470, 480, 485; *Robinson v. Wallace*, 37 Pa. St. 133.

7 *Wheeler v. Raymond*, 130 Mass. 247, 248; *Nash v. Mitchell*, 71 N. Y. 199, 203; 27 Am. Rep. 38.

8 *Tillman v. Shackleton*, 15 Mich. 447, 454; *Chapman v. Briggs*, 11 Allen, 547.

9 *Manderback v. Mock*, 29 Pa. St. 43, 47.

10 Discussed *ante*, §§ 239, 372.

§ 471. **Married women's capacity to trade under statutes referring thereto.**—A statute securing to a married woman her earnings or the products of her skill and industry, by implication, enables her to earn money and to trade.<sup>1</sup> just as statutes securing to married women property acquired by purchase enable them to purchase on credit;<sup>2</sup> thus alone are such statutes given a reasonable meaning. A statute enabling married women to trade, unless it contains restricting provisions,<sup>3</sup> enables them to trade just as if they were sole,<sup>4</sup> to use any of the usual means of trade,<sup>5</sup> and to engage in any legitimate calling.<sup>6</sup> A married woman may also trade under statutes giving her the capacities of a *femme sole* as to contracts.<sup>7</sup>

1 See *Haight v. McVeagh*, 69 Ill. 624, 628; *Adams v. Honness*, 62 Barb. 326, 336; *Krouskop v. Shontz*, 51 Wis. 204, 215; *Dayton v. Walsh*, 46 Wis. 113, 120; 32 Am. Rep. 757.

2 *Tiemeyer v. Turnquist*, 85 N. Y. 516, 521; 39 Am. Rep. 674; *ante*, § 224.

3 *Post*, § 471. But see *Bradstreet v. Baer*, 41 Md. 19, 23.

4 *Bodine v. Killeen*, 53 N. Y. 93, 96; *post*, §§ 473-481.

5 *Guttman v. Scannell*, 7 Cal. 455, 459; *post*, §§ 475, 480.

6 *Haight v. McVeagh*, 69 Ill. 624, 628; *ante*, § 465.

7 See *ante*, § 372.

§ 472. **Married women's capacities to trade under statutes containing limitations.**—Under a statute enabling a married woman to trade with a capital of one thousand dollars or less, and creating a special remedy against her property for her trade debts, it was held that she had no powers not expressly given; that the naming of one mode of trade was a negation of all other modes; and that she could not trade as a partner because not expressly authorized.<sup>1</sup> In many States the statutes require a wife who wishes to engage in trade to comply with certain prerequisites: such as making a declaration of record,<sup>2</sup> obtaining a license,<sup>3</sup> or decree of court,<sup>4</sup> and such requirements must, it seems, be

complied with to give her any new capacity.<sup>5</sup> But a statute providing that her husband shall not manage her business has for its sole object the protection of the husband's creditors, and when no question in which they are concerned is involved, she has the same capacities to trade with as without her husband;<sup>6</sup> and the same would seem to apply to a statute requiring her to trade in her own name.<sup>7</sup> When she can be declared a trader only when her husband cannot or refuses to support her, his mere temporary sickness will not suffice.<sup>8</sup> Nor will a court of equity with a discretion decree her a trader when she would thus be enabled to commit a fraud.<sup>9</sup> When a statute requires "a married woman doing business on her separate account" to file a certificate, this does not apply to married women making investments of their separate property.<sup>10</sup> A married woman need file no inventory of her business unless this is required by statute;<sup>11</sup> nor need she have separate property to start with.<sup>12</sup> But her powers are fully discussed elsewhere.<sup>13</sup>

1 *Bradstreet v. Baer*, 41 Md. 19, 23; *Cruzen v. McKaig*, 57 Md. 454, 462; *post*, § 480.

2 *Adams v. Knowlton*, 22 Cal. 233, 239; *Camden v. Mullen*, 29 Cal. 564, 569; *Reading v. Mullen*, 31 Cal. 104, 106; *Wheeler v. Raymond*, 130 Mass. 247, 248; *Snow v. Sheldon*, 126 Mass. 332, 334; 30 Am. Rep. 684.

3 *Youngworth v. Jewell*, 15 Nev. 45, 47.

4 *Martinetz v. Ward*, 19 Fla. 384, 396; *Franklin*, 19 Ky. 497, 498; *Moran*, 12 Bush, 303; *Uhrig v. Horstman*, 8 Bush, 172, 177; *King v. Thompson*, 87 Pa. St. 365, 363; 30 Am. Rep. 364; *Elsley v. McDaniel*, 95 Pa. St. 472, 474; *Orrell v. Van Gorder*, 96 Pa. St. 180, 181.

5 *Uhrig v. Horstman*, 8 Bush, 172, 177; *Elsley v. McDaniel*, 95 Pa. St. 472, 474; *supra*, notes 2-4.

6 *Porter v. Gamba*, 43 Cal. 105, 109. See *Youngworth v. Jewell*, 15 Nev. 45, 47.

7 But see *Christensen v. Stumpf*, 16 La. An. 50.

8 *King v. Thompson*, 87 Pa. St. 365, 363; 30 Am. Rep. 364.

9 *Moran*, 12 Bush, 303.

10 *Wheeler v. Raymond*, 130 Mass. 247, 248; *ante*, § 470.

11 *Jarman v. Woolloton*, 3 Term, 618, 622.

12 *Tallman v. Jones*, 13 Kan. 438, 446; *post*, § 475.

13 *Post*, §§ 474, 475.

## ARTICLE II.—INCIDENTS OF CAPACITY TO TRADE.

- § 473. How far dependent on sources of capacity.
- § 474. Express powers under statutes.
- § 475. Implied powers under statutes.
- § 476. Rights of wife's creditors.
- § 477. Rights of husband's creditors.
- § 478. Rights and liabilities of husband.
- § 479. Married women as agents in trade.
- § 480. Married women as partners.
- § 481. Married women as incorporators, stockholders, etc.

§ 473. Incidents of married women's trade, how far dependent on the source of her capacity. — The status, rights, and liabilities of a married woman trader depend very largely on the source of her capacity to trade.<sup>1</sup> Generally speaking, when she can trade only by virtue of her ownership of equitable or statutory separate estate,<sup>2</sup> she cannot trade on her personal credit or act as a *femme sole*,<sup>3</sup> but can only deal with the property so that the profits will enure to her own benefit,<sup>4</sup> and can only render it liable for her debts by charging it, contracting with reference to it, etc., her contracts being valid not on account of her being a trader, but because made in such a way or for such a purpose as the law allows.<sup>5</sup> So when she trades simply as her husband's agent, though she binds him she does not bind herself personally<sup>6</sup>—she may have the profits if he chooses to let her keep them,<sup>7</sup> but he and the business are liable for the debts contracted by her on its behalf.<sup>8</sup> When, however, she may trade personally, by virtue of her husband's abandonment, by custom, or by statute, she can trade just as if she were unmarried,<sup>9</sup> unless, of course, the statute limits her capacity.<sup>10</sup> In such case she, for the purposes connected with her business, has the status of a *femme sole*,<sup>11</sup> the fullest rights to the enjoy-

ment of the profits of the business,<sup>12</sup> and the fullest liabilities for its debts.<sup>13</sup>

1 Discussed *ante*, §§ 464-472.

2 *Ante*, §§ 468, 470.

3 O'Daily v. Morris, 31 Ind. 111, 112; Glover v. Alcott, 11 Mich. 470, 485; Robinson v. Wallace, 39 Pa. St. 133.

4 Carey v. Burruss, 20 W. Va. 571, 579; Mitchell v. Sawyer, 21 Iowa, 582, 583.

5 See Tillman v. Shackleton, 15 Mich. 470, 480, 485; Chapman v. Briggs, 11 Allen, 547; Manderback v. Mock, 29 Pa. St. 43, 47; Todd v. Lee, 16 Wis. 480, 483.

6 See Conklin v. Doul, 67 Ill. 355, 357; Tuttle v. Hoag, 46 Mo. 38, 41; 2 Am. Rep. 481; *ante*, §§ 336, 363; *post*, §§ 479, 483.

7 See Penn v. Whitehead, 17 Gratt. 503, 512; Conklin v. Doul, 67 Ill. 355, 357; *ante*, § 469.

8 Partridge v. Stocker, 36 Vt. 108, 114; *ante*, § 469; *post*, § 478.

9 Abbey v. Deyo, 44 Barb. 374, 381; *post*, §§ 474, 475.

10 Young v. Gori, 13 Abb. Pr. 13, 14, n.; *post*, § 475.

11 See *post*, § 475.

12 Dayton v. Walsh, 47 Wis. 113, 120; 32 Am. Rep. 757; *post*, § 475.

13 Wallace v. Rowley, 91 Ind. 105, 109; *post*, § 476.

§ 474. Rights and liabilities of married women traders under the express terms of the statutes. — Most of the statutes as to married women traders expressly provide that they shall trade as if sole, and under such statutes no special questions seem to have arisen;<sup>1</sup> the main questions are as to the implied powers of married women traders.<sup>2</sup> In one case it was held that the naming of certain powers of trade was a negation of all other powers;<sup>3</sup> but the weight of authority seems to be to the contrary.<sup>4</sup>

1 See Berry v. Zeiss, 32 Up. Can. C. P. 231, 239; Porter v. Gamba, 43 Cal. 105, 109; Martinetz v. Ward, 19 Fla. 175, 187, 188; Kingman v. Frank, 19 Cent. L. J. 470, 471; Williams v. Lord, 75 Va. 390, 398, 399; Krouskop v. Shontz, 51 Wis. 204, 217.

2 Discussed *post*, § 475.

3 Bradstreet v. Baer, 41 Md. 19, 23; Cruzen v. McKaig, 57 Md. 454, 462.

4 See *post*, §§ 475, 480.

§ 475. Implied powers under statutes of married women traders. — Under statutes enabling a married woman to



trade and not limiting her capacities, she may trade precisely as if unmarried; she is, as to her business, a *femme sole*, and may do all things incidental to trading in general, and all things usual and proper in the particular trade in which she is engaged.<sup>1</sup> The object of these statutes is not only to do justice to wives,<sup>2</sup> but also to encourage trade.<sup>3</sup> Thus, she may engage in any legitimate calling.<sup>4</sup> She may conduct the business personally or by agent; she may have her salesmen and clerks;<sup>5</sup> she may be a partner, silent or active;<sup>6</sup> and she may, unless this is prohibited by statute, have her husband as her agent,<sup>7</sup> or be a partner with him, though this is in some States denied.<sup>8</sup> She need not, unless the statute so provides,<sup>9</sup> have separate property to begin with;<sup>10</sup> she may start out on credit,<sup>11</sup> or use property given her by her husband,<sup>12</sup> though in the latter case his creditors may have rights.<sup>13</sup> The capital<sup>14</sup> and stock in trade<sup>15</sup> of her business, as well as the profits,<sup>16</sup> are entirely hers; for instance, the bills due her as a boarding-house keeper,<sup>17</sup> and such property, though in the possession of her and her husband, is in her possession, the possession relating to the title.<sup>18</sup> She may on credit purchase goods for her trade;<sup>19</sup> or buy land<sup>20</sup> or seed<sup>21</sup> for farming purposes; or rent a store;<sup>22</sup> or contract for her services;<sup>23</sup> or contract for working a quarry—for the labor and mules;<sup>24</sup> she may transfer a note received in the course of trade;<sup>25</sup> she may even sell out her business, and agree not to use the same name again.<sup>26</sup> She is personally liable on all contracts which she executes in the conduct of her business,<sup>27</sup> even as indorser of a note;<sup>28</sup> she is liable for the frauds of her employees,<sup>29</sup> and is estopped as if sole from denying their right to represent her;<sup>30</sup> she is liable for goods consigned to her.<sup>31</sup> She may sue and be sued alone and at law,<sup>32</sup> except, perhaps, as to suits with her husband;<sup>33</sup> and a

general judgment may be obtained against her.<sup>34</sup> The question whether a particular transaction of hers was in the course of her business is one of fact.<sup>35</sup> In suing, she must allege and prove this;<sup>36</sup> and when she is sued, the plaintiff must allege the grounds of the liability,<sup>37</sup> must allege and prove affirmatively that she was engaged in business, and that the particular transaction was connected with such business.<sup>38</sup> She may make a deed for the benefit of creditors,<sup>39</sup> and take the benefit of the insolvent laws.<sup>40</sup>

1 Young v. Gori, 13 Abb. Pr. 13, 14, n. See Berry v. Zeiss, 32 Up. Can. C. P. 231, 239; Tieber v. Stover, 50 Ark. 727, 730; Camden v. Mullen, 20 Cal. 564, 566; Porter v. Gamba, 43 Cal. 105, 109; Rockwell v. Clark, 44 Conn. 534, 536; Martinetz v. Ward, 19 Fla. 175, 187; Nispel v. Laparle, 74 Ill. 366, 368; Wallace v. Rowley, 91 Ind. 586, 589; Tallman v. Jones, 13 Kan. 438, 445; Mitchell v. Sawyer, 21 Iowa, 582, 583; Snow v. Sheldon, 126 Mass. 332, 334; 10 Am. Rep. 634; Knowles v. Hull, 99 Mass. 562, 564; Rankin v. West, 25 Mich. 195, 201; Allen v. Johnson, 48 Miss. 413, 418; Netterville v. Barber, 52 Miss. 163, 172; Youngworth v. Jewell, 15 Nev. 45, 47; Wheaton v. Phillips, 12 N. J. Eq. 224, 223; Barton v. Beer, 35 Barb. 78, 80; James v. Taylor, 43 Barb. 500, 531; Abbey v. Deyo, 44 Barb. 374, 381; Adams v. Honness, 62 Barb. 326, 336; Wood v. Sanchez, 3 Daly, 197, 198; Nash v. Mitchell, 71 N. Y. 200, 203; 24 Am. Rep. 38; Frecking v. Roland, 53 N. Y. 422, 425; Bodine v. Killen, 53 N. Y. 93, 96; Baum v. Mullen, 47 N. Y. 577, 579; Sammis v. McLaughlin, 35 N. Y. 647, 650; Kingman v. Frank, 19 Cent. L. J. 479, 471; Morgan v. Perhamus, 56 Ohio St. 517; Silveus v. Porter, 74 Pa. St. 448, 451; Willhaus v. Ludecus, 5 Rich. 326, 329; Newbiggin v. Pillans, 2 Bay, 162, 165; Williams v. Lord, 75 Va. 330, 338; Krouskop v. Shontz, 51 Wis. 204, 217; Dayton v. Walsh, 47 Wis. 113, 120; 32 Am. Rep. 757.

2 Youngworth v. Jewell, 15 Nev. 45, 47.

3 See McDaniel v. Cornwall, 1 Hill (S. C.) 423, 429.

4 Guttman v. Scannell, 7 Cal. 455, 459; *ante*, § 463.

5 Guttman v. Scannell, 7 Cal. 455, 459; Abbey v. Deyo, 44 Barb. 374, 381. Consult *ante*, §§ 84-83.

6 Parshall v. Fisher, 43 Mich. 529, 534; *post*, § 430.

7 Guttman v. Scannell, 7 Cal. 455, 459; Bellows v. Rosenthal, 31 Ind. 116; Rankin v. West, 25 Mich. 195, 200; Lockwood v. Cullin, 4 Robt. 129, 136; *ante*, §§ 84-83.

8 Zimmerman v. Erhard, 53 How. Pr. 11, 13; *post*, § 480.

9 Franklin, 79 Ky. 497, 498.

10 Tallman v. Jones, 13 Kan. 438, 445; Dayton v. Walsh, 47 Wis. 113, 120; 32 Am. Rep. 757. See *ante*, §§ 463, 470.

11 Young v. Gori, 13 Abb. Pr. 13, 14, n.; *supra*, n. 1.

12 Lockwood v. Cullin, 4 Robt. 129, 136.

13 See Penn v. Whitehead, 12 Gratt. 74; *ante*, §§ 113-118; *post*, § 477.

14 James v. Taylor, 43 Barb. 500, 531; *ante*, §§ 468, 470.

15 Lovell v. Newton, Law R. 4 C. P. D. 7, 12; *ante*, §§ 468, 470.

16 *Mitchell v. Sawyer*, 21 Iowa, 332, 583; *Sammis v. McLaughlin*, 35 N. Y. 647, 650; *Silveus v. Porter*, 71 Pa. St. 448, 451; *Meyers v. Rahte*, 46 Wis. 655, 659; *Dayton v. Walsh*, 47 Wis. 113, 120; 32 Am. Rep. 757; *ante*, §§ 203, 227, 468, 470.

17 See *Dawes v. Rodier*, 125 Mass. 421, 423.

18 *Newbrick v. Dugan*, 61 Ala. 251, 253; *ante*, §§ 119-121.

19 *Nispel v. Laparle*, 74 Ill. 306, 308; *Freeking v. Rolland*, 53 N. Y. 422, 425.

20 *Camden v. Mullen*, 29 Cal. 564, 566; *Chapman v. Foster*, 6 Allen, 136, 138.

21 *Camden v. Mullen*, 29 Cal. 564, 566.

22 *Knowles v. Hull*, 93 Mass. 562, 564.

23 *Adams v. Honness*, 62 Barb. 323, 326.

24 *Netterville v. Barber*, 52 Miss. 163, 172.

25 *Rockwell v. Clark*, 44 Conn. 534, 536.

26 *Morgan v. Perhamus*, 36 Ohio St. 517.

27 *Barton v. Beer*, 35 Barb. 73, 80. See *Trieber v. Stover*, 30 Ark. 727, 730; *Nispel v. Laparle*, 74 Ill. 306, 308; *supra*, n. 1.

28 *Willhaus v. Ludecus*, 5 Rich. 326, 327.

29 *Baum v. Mullen*, 47 N. Y. 577, 579.

30 *Bodine v. Killeen*, 53 N. Y. 93, 96; *ante*, § 414.

31 *Newbiggin v. Pillans*, 2 Bay, 162, 165.

32 *Trieber v. Stover*, 30 Ark. 727, 730; *Rockwell v. Clark*, 44 Conn. 534, 536; *Wheaton v. Phillips*, 12 N. J. Eq. 221, 223; *Nash v. Mitchell*, 71 N. Y. 200, 203; 27 Am. Rep. 38; *Meyers v. Rahte*, 45 Wis. 655, 659; *ante*, §§ 441, 451.

33 *Trieber v. Stover*, 30 Ark. 727, 730; *ante*, §§ 54, 453.

34 *Porter v. Gamba*, 43 Cal. 105, 109; *ante*, §§ 453, 453.

35 *Camden v. Mullen*, 29 Cal. 564, 567.

36 *Smith v. New England*, 45 Conn. 415, 420; *ante*, § 431.

37 See *ante*, § 431, n. 2.

38 *Reading v. Mullen*, 47 N. Y. 577, 579; *Wood v. Sanchez*, 3 Daly, 197, 198; *Nash v. Mitchell*, 71 N. Y. 200, 203; 27 Am. Rep. 38.

39 *Shumann v. Peddicord*, 50 Md. 560.

40 See *Holland*, Law R. 9 Ch. 307, 311; *Kinkad*, 3 Biss. 403, 410. But see *Relief v. Schmidt*, 55 Md. 97; *ante*, §§ 16, 265.

§ 476. **The rights of the wife's creditors.**—The business creditors of a married woman trader have, under the statutes generally, the same rights as if she were sole;<sup>1</sup> they may sue her alone,<sup>2</sup> and obtain a general judgment against her.<sup>3</sup> If she is a partner, all the partners must be joined.<sup>4</sup> The husband cannot set up against them any rights that he might have against her in property he has suffered her to use in the busi-

ness.<sup>5</sup> If she is not trading with a personal capacity, but simply by virtue of her ownership of separate property, such creditors have generally no rights *in personam* against her.<sup>6</sup> In some States her creditors are given special remedies.<sup>7</sup> When she acts simply as her husband's agent, her creditors are really his creditors, and the business is really his business.<sup>8</sup> Her creditors other than those of her business can proceed against her business only as they could against her other separate property.<sup>9</sup>

1 Nispel v. Laparle, 74 Ill. 306, 308; *ante*, § 475, n. 1.

2 Meyers v. Rahte, 46 Wis. 655, 659; *ante*, § 475, n. 32.

3 Porter v. Gamba, 43 Cal. 105, 109; *ante*, §§ 453, 458.

4 Westphal v. Heuvey, 49 Iowa, 542, 543.

5 Green v. Pallas, 12 N. J. Eq. 267, 268; Partridge v. Stocker, 36 Vt. 108, 114.

6 O'Daily v. Morris, 31 Ind. 111, 112; Glover v. Alcott, 11 Mich. 470, 485; Robinson v. Wallace, 39 Pa. St. 133.

7 Brent v. Taylor, 6 Md. 58, 68.

8 Conklin v. Doul, 67 Ill. 355, 359; Switzer v. Valentine, 4 Duer, 56, 99; Swasey v. Antram, 24 Ohio St. 87, 95; Jacobs v. Featherstone, 6 Watts & S. 347, 349.

9 See Wood v. Sanchez, 3 Daly, 197, 198; Nash v. Mitchell, 71 N. Y. 200, 203; 27 Am. Rep. 38.

§ 477. **The rights of the husband's creditors.**—If the wife labors in her husband's business,<sup>1</sup> or allows her property to be used therein,<sup>2</sup> the profits are nevertheless subject to the rights of his creditors; but she is not personally liable to the creditors of the business if she has acted only as his agent, and has no capacity to contract.<sup>3</sup> His creditors have the right to go against her separate business for any sums put into it by her husband in fraud of their rights,<sup>4</sup> but it is doubtful whether this applies to a *bona fide* gift by him to her of his services;<sup>5</sup> in some cases an apportionment has been made,<sup>6</sup> and this would of course be done if he and she were partners.<sup>7</sup> His creditors have no rights in the profits of her separate business,<sup>8</sup> in cases where he

has provided neither property nor services. Still, they have the right to treat the business as his when she has not complied with the requirements, as to filing a declaration of record, etc.<sup>9</sup> When she cannot be his partner, she incurs no liability by holding herself out as such.<sup>10</sup>

1 *Clinton v. Himmell*, 25 N. J. Eq. 45, 47; *ante*, §§ 65, 130. See *Dumas v. Neal*, 51 Ga. 563, 566.

2 *Patton v. Gates*, 67 Ill. 164, 167; *Wilson v. Loomis*, 55 Ill. 352, 355; *ante*, §§ 129, 132.

3 *Conklin v. Dougl.*, 67 Ill. 355, 358; *O'Daily v. Morris*, 31 Ind. 111, 112; *Glover v. Alcott*, 11 Mich. 470, 485; *Tuttle v. Hoag*, 46 Mo. 38, 41; 2 Am. Rep. 481.

4 *Thomas v. Desmond*, 63 Cal. 426, 427; *Penn v. Whitehead*, 17 Gratt. 503, 512; *Richardson v. Merrill*, 32 Vt. 27, 36; *ante*, §§ 113-118.

5 Discussed *ante*, §§ 87, 130.

6 See *Taylor v. Glidden*, 16 Ohio St. 509, 522; *Penn v. Whitehead*, 17 Gratt. 503, 513.

7 See *post*, § 480.

8 *Bellows v. Rosenthal*, 31 Ind. 116, 117, 118; cases *ante*, §§ 87, 209, 227.

9 *Porter v. Gamba*, 43 Cal. 105, 109; *ante*, § 472.

10 *Montgomery v. Sprinkle*, 31 Ind. 113, 115; *Lord v. Parker*, 3 Allen, 127.

§ 478. **Rights and liabilities of husband of married woman trader.**—When a man married a woman engaged in trade, he at common law took the business with its assets<sup>1</sup> and liabilities;<sup>2</sup> now he is liable only where he is still liable for her antenuptial debts,<sup>3</sup> and has the right to the business only when such property is secured to her neither by settlement nor by statute.<sup>4</sup> So at common law, all the profits of her business during coverture vested with her other earnings and the other increase of her property in him; but this, too, is generally changed.<sup>5</sup> It is his business and he is fully liable,<sup>6</sup> and need not give her any part of the profits,<sup>7</sup> if she is trading simply by his consent and has no other authority;<sup>8</sup> she may even be a partner in his place.<sup>9</sup> When all the credit is given to her he is not liable.<sup>10</sup> Nor is he liable when she is trading independently of

him under the statutes,<sup>11</sup> unless he is a partner,<sup>12</sup> or actually joins in the transaction.<sup>13</sup>

1 Ashworth v. Outram, Law R. 5 Ch. D. 923, 929.

2 Alexander v. Morgan, 31 Ohio St. 546, 550.

3 Discussed *ante*, § 67.

4 Rockwell v. Clark, 44 Conn. 534, 536 ; *ante*, §§ 203, 227.

5 Stimson v. White, 20 Wis. 562, 563 ; *ante*, § 463.

6 Jenkins v. Flinn, 37 Ind. 349, 352 ; Oxnard v. Swanton, 39 Me. 125, 129 ; Barton v. Beer, 35 Barb. 78, 79 ; Jacobs v. Feathersby, 6 Watts & S. 347, 349 ; *ante*, § 469.

7 Conklin v. Dougl., 67 Ill. 355, 357 ; Stimson v. White, 20 Wis. 562, 563.

8 Discussed *ante*, §§ 93, 469.

9 Swasey v. Antram, 24 Ohio St. 87, 95.

10 Jenkins v. Flinn, 37 Ind. 349, 352 ; Tuttle v. Hoag, 46 Mo. 38, 42 ; 2 Am. Rep. 481 ; *ante*, § 89.

11 Trieber v. Stover, 30 Ark. 727, 731 ; Smith v. Thompson, 26 Conn. 197, 199 ; Haight v. McVeagh, 61 Ill. 624, 628 ; Jaycox v. Wing, 61 Ill. 182, 184 ; Colby v. Lamson, 39 Me. 119, 121 ; Tuttle v. Hoag, 46 Mo. 38, 42 ; 2 Am. Rep. 481 ; Alexander v. Morgan, 31 Ohio St. 546, 551.

12 See *post*, § 480.

13 Krouskop v. Shontz, 51 Wis. 204, 217.

§ 479. **Married women trading as agents.**—A married woman is not by coverture incapacitated from being an agent ;<sup>1</sup> and one may frequently be found conducting another's business, especially that of her husband ;<sup>2</sup> one may be a partner, even, in her husband's place.<sup>3</sup> In such cases she binds her principal of course,<sup>4</sup> but she does not bind herself as other agents may, unless she has the personal capacity to bind herself independently of her agency ;<sup>5</sup> and it seems that if she acted simply as agent, she would not be trading so as to be liable as a trader.

1 *Ante*, §§ 336, 363 ; *post*, § 483.

2 Penn v. Whitehead, 17 Gratt. 503, 512 ; Jenkins v. Flinn, 37 Ind. 349, 352 ; *ante*, §§ 90, 93, 469.

3 Swasey v. Antram, 24 Ohio St. 87, 95.

4 Barton v. Beer, 35 Barb. 78, 79.

5 Consult *post*, §§ 482, 483.

§ 480. **Married women as partners.**—It has been held that a married woman trading in equity with her equi-

table separate property may enter into partnership;<sup>1</sup> but this statement must be taken with limitations. For the normal contract of partnership is a personal contract, involving a personal capacity,<sup>2</sup> which a married woman does not have either in equity,<sup>3</sup> or under mere separate property acts.<sup>4</sup> And therefore it is settled that statutes securing to married women their property, with the rents, profits, increase, etc., thereof, although they enable her to trade in a limited way,<sup>5</sup> do not enable her to enter into partnership.<sup>6</sup> At common law, when a female partner married the partnership was dissolved,<sup>7</sup> and now she cannot be a partner if she has no capacity to trade personally,<sup>8</sup> or if she is expressly prohibited by the statute enabling her to trade,<sup>9</sup> or so far as she is partially prohibited,<sup>10</sup> as she is in some States. But as she has, under the statutes giving her the capacity to trade generally, the personal capacity to trade as if sole, and the power to pursue all the usual methods of trade,<sup>11</sup> she may, under such acts, trade in partnership;<sup>12</sup> she may even be held responsible as a secret partner.<sup>13</sup> Still, in a few cases, and on different grounds, this has been denied.<sup>14</sup> So, as she is a *femme sole* in her trade,<sup>15</sup> and may employ an agent, general or special,<sup>16</sup> and may employ her husband as such,<sup>17</sup> there seems to be no reason why she should not be able to form a partnership with her husband; and many cases hold,<sup>18</sup> while others assume,<sup>19</sup> that she may. But this is also strenuously denied, on the ground that even where a married woman may contract, she cannot, without express authority, contract with her husband,<sup>20</sup> and that the particular statute enables her to trade on her *separate* account.<sup>21</sup> To this it is replied, that if she may employ her husband as her agent, as all admit she can,<sup>22</sup> it is not consistent to say that she cannot contract with him;<sup>23</sup> and that the word "sepa-

rate" in the statutes does not refer to the mode in which a married woman shall trade, but to her status as independent of her husband's marital control and marriage rights.<sup>24</sup> In such cases, as she cannot be a partner, and therefore could not be held liable on a partnership note signed by one of the other partners,<sup>25</sup> she can, nevertheless, be liable on her individual acts,<sup>26</sup> nor does she, in such cases, lose her property put into a firm business.<sup>27</sup> Though she may not join a firm of which her husband is a member,<sup>28</sup> she may, after his retirement, go in, and on a new consideration become liable for the pre-existing partnership debts.<sup>29</sup> So, although she cannot be a partner, she may jointly lease and share the profits of joint property,<sup>30</sup> and be bound by her husband's acts as her agent with respect thereto.<sup>31</sup> If the husband has furnished part of her capital, her business may *pro tanto* be liable for his debts,<sup>32</sup> and the courts have sometimes, without speaking of husband and wife as partners, ordered an apportionment of the profits of a business jointly carried on by them.<sup>33</sup>

1 Penn v. Whitehead, 17 Gratt. 503, 512.

2 Carey v. Burruss, 20 W. Va. 571, 576 ; 43 Am. Rep. 790.

3 Staley v. Hamilton, 19 Fla. 275, 277 ; *ante*, § 206.

4 Russel v. People, 39 Mich. 671, 673 ; 33 Am. Rep. 444 ; *ante*, §§ 237-239, 370.

5 Discussed *ante*, §§ 468, 470.

6 Bradstreet v. Baer, 41 Md. 19, 23 ; Mayer v. Soyster, 30 Md. 403 ; Howard v. Stephens, 52 Miss. 239, 244 ; Bradford v. Johnson, 44 Tex. 381, 383 ; Carey v. Burruss, 20 W. Va. 571, 576 ; 43 Am. Rep. 790.

7 Bassett v. Shepardson, 17 N. W. Rep. 216, 219 ; 52 Mich. 3, 7 ; Alexander v. Morgan, 31 Ohio St. 546, 550.

8 Swasey v. Antram, 24 Ohio St. 87, 95 ; Carey v. Burruss, 20 W. Va. 571, 575 ; 43 Am. Rep. 790.

9 See Todd v. Clapp, 118 Mass. 495, 496.

10 See Porter v. Gamba, 43 Cal. 105, 109.

11 Zimmerman v. Erhard, 53 How. Pr. 11, 14 ; *ante*, § 475.

12 Kinkead, 3 Biss. 405, 410 ; Camden v. Mullen, 29 Cal. 564, 565 ; Francis v. Diekel, 68 Ga. 255, 258 ; Preusser v. Henshaw, 49 Iowa, 41, 44 ; Westphal v. Henney, 49 Iowa, 542, 543 ; Plumer v. Lord, 5 Allen,



460, 462; *Parshall v. Fisher*, 43 Mich. 529, 532, 534; *Newman v. Morris*, 52 Miss. 402, 406; *Zimmerman v. Erhard*, 58 How. Pr. 11, 13; 8 Daly, 311; *Bitter v. Rathman*, 61 N. Y. 512, 513; *Scott v. Conway*, 58 N. Y. 619; *Graff v. Kennedy*, 31 Alb. L. J. 2; *Silveus v. Porter*, 74 Pa. St. 448, 449; *Krouskop v. Shontz*, 51 Wis. 204, 217; *Horneffer v. Duress*, 13 Wis. 603, 605.

13 See *Parshall v. Fisher*, 43 Mich. 529, 534; *Scott v. Conway*, 58 N. Y. 619; *Bitter v. Rathman*, 61 N. Y. 512, 513.

14 *Haas v. Shaw*, 91 Ind. 384, 387, 396; *Montgomery v. Sprinkle*, 31 Ind. 113, 115; *Mayhew v. Baker*, 15 Ind. 254, 257; *Bradstreet v. Baer*, 41 Md. 19, 23; *Cruzen v. McKaig*, 57 Md. 454, 462; *Moyer v. Soyster*, 30 Md. 403; *Carey v. Burruss*, 20 W. Va. 571, 576; 43 Am. Rep. 790; *supra*, n. 9.

15 *Young v. Gori*, 13 Abb. Pr. 13, 14, n; *ante*, § 475.

16 *Abbey v. Deyo*, 44 Barb. 374, 381; *ante*, § 475.

17 *Rankin v. West*, 25 Mich. 195, 200; *ante*, §§ 87, 475.

18 *Kinthead*, 3 Biss. 405, 410; *Francis v. Dickel*, 68 Ga. 255, 258; *Newman v. Morris*, 52 Miss. 402, 406; *Zimmerman v. Erhard*, 58 How. Pr. 11, 13; *Graff v. Kennedy*, 31 Alb. L. J. 2.

19 *Cannden v. Mullen*, 29 Cal. 564, 565; *Westphal v. Hennessey*, 49 Iowa, 542, 543; *Parshall v. Fisher*, 43 Mich. 529, 532, 534; *Silveus v. Porter*, 74 Pa. St. 448, 449; *Krouskop v. Shontz*, 51 Wis. 204, 217; *Horneffer v. Duress*, 13 Wis. 603, 604.

20 See *ante*, § 43; *infra*, n. 21.

21 *Lord v. Parker*, 3 Allen, 127, 129; *Edwards v. Stevens*, 3 Allen, 315; *Plumer v. Lord*, 5 Allen, 460, 462; *Allen v. Johnson*, 48 Miss. 413. See *Haas v. Shaw*, 91 Ind. 384, 389; *supra*, n. 14.

22 *Ante*, §§ 87, 475.

23 *Zimmerman v. Erhard*, 58 How. Pr. 11, 13.

24 *Zimmerman v. Erhard*, 58 How. Pr. 11, 14; *ante*, § 472.

25 *Carey v. Burruss*, 20 W. Va. 571, 532; 43 Am. Rep. 790; *Plumer v. Lord*, 7 Allen, 481, 485.

26 *Cruzen v. McKaig*, 57 Md. 454, 462.

27 *Mayhew v. Baker*, 15 Ind. 254, 257.

28 *Plumer v. Lord*, 7 Allen, 481, 484.

29 *Preusser v. Henshaw*, 49 Iowa, 41, 44.

30 *Allen v. Johnson*, 48 Miss. 413, 419.

31 *Reiman v. Hamilton*, 111 Mass. 245, 247.

32 *Horneffer v. Duress*, 13 Wis. 603, 605; *ante*, §§ 113-118, 129, 130, 478.

33 *Taylor v. Glidden*, 16 Ohio St. 509, 522; *Penn v. Whitehead*, 17 Gratt. 503, 513; *ante*, §§ 87, 129, 130.

§ 481. Married women as incorporators, stockholders, etc.—Very nearly the same questions arise in considering a married woman's capacity to be an incorporator as those which are involved in her right to be a partner.<sup>1</sup> Corporators enter into a mutual and personal contract, which is concluded by the act of incorpora-

tion;<sup>2</sup> and, therefore, without personal capacity to contract, a married woman could not be an incorporator.<sup>3</sup> But as business is very commonly carried on by corporations, a married woman with capacity to trade would, it seems, have capacity to be an incorporator.<sup>4</sup> The fact that the corporation laws provide that "any person" may be an incorporator, would not affect a married woman under incapacity, by virtue of a rule already discussed.<sup>5</sup> But a married woman may be a stockholder,<sup>6</sup> holding her stock as any other chose in action;<sup>7</sup> and it has been held that when she can hold stock as if sole, she is liable as any other stockholder—for example, for assessments.<sup>8</sup>

1 *Plumer v. Lord*, 5 Allen, 460, 462.

2 *Taylor Corporations*, § 31.

3 No decision.

4 In accordance with the spirit of, *ante*, § 475.

5 *Ante*, §§ 12, 369.

6 See Cal. Civ. Code 1881, §§ 235-325; W. Va. Code 1878, ch. 122, § 9.

7 *Ante*, §§ 173, 219.

8 *Anderson v. Line*, 14 Fed. Rep. 405, 406; *The Reciprocity Bank*, 22 N. Y. 9, 15; *ante*, §§ 12, 369.

## CHAPTER XXVIII.

## MARRIED WOMEN IN REPRESENTATIVE CAPACITIES.

- § 482. The questions involved.
- § 483. Some general rules.
- § 484. Married women as agents.
- § 485. Married women as trustees.
- § 486. Married women as executrices, etc.
- § 487. Married women as guardians.

§ 482. The questions involved.—Whether married women may act in representative capacities—whether they may be agents, trustees, administrators, executors, guardians, etc.—and how far their acts in such capacities have the same effect as the acts of persons *sui juris* in similar capacities, are questions which are nowhere fully discussed; and much confusion is likely to result in such a discussion, unless the different points of view from which the subject may be approached be borne in mind. For example, a married woman may be an agent, in the sense that she may, just as if she were sole, bind a party who has authorized her to act for her,<sup>1</sup> but not necessarily at the same time, in the sense that she may recover compensation for her services,<sup>2</sup> or be liable for money received to her principal's use,<sup>3</sup> or be personally liable to third parties with whom she has dealt in her own name.<sup>4</sup> So she may be a trustee, in the sense that her husband cannot claim substantial rights in property of which she holds only the bare legal title,<sup>5</sup> and that she may dispose of such property in accordance with the powers vested in her by the trust;<sup>6</sup> and yet she would not therefore be liable personally for work done at her request,<sup>7</sup> as a person *sui juris* would be,<sup>8</sup> or be able to bind herself personally

to execute the powers of her trust.<sup>9</sup> And so she may be an administratrix, in the sense that once appointed she may act as such,<sup>10</sup> and yet her appointment may depend on the consent of her husband.<sup>11</sup> It thus plainly appears that a married woman who may act in a representative capacity, does not, while so acting, have the same rights and liabilities as a *femme sole*, and that the following questions may arise, namely: (1) How far do her conjugal obligations conflict with her right to act in a representative capacity—how far has her husband the right to control her in this respect? (2) How far do her personal disabilities—her coverture—affect her capacity to so act? (3) How far do her acts in a representative capacity affect her personally, (4) or her husband, (5) or her principal or estate, (6) or the third parties with whom she deals? And these questions will be discussed first generally,<sup>12</sup> and then as involved in the most usual of capacities in which she may act.<sup>13</sup>

1 Debenham v. Mellon, Law R. 5 Q. B. D. 394, 402; *ante*, §§ 89-98; *post*, § 484.

2 Hazelbaker v. Goodfellow, 64 Ill. 238, 241; Abbey v. Deyo, 44 Barb. 374, 380; *ante*, § 65.

3 Tucker v. Cocke, 32 Miss. 184, 189; Andrews v. Ormsbee, 11 Mo. 400, 402; Carleton v. Haywood, 49 N. H. 314, 320; *ante*, § 381.

4 See Tuttle v. Hoag, 46 Mo. 41, 42; 2 Am. Rep. 481.

5 Claussen v. La Franz, 1 Iowa, 226, 234; *post*, § 485.

6 1 Perry Trusts, § 48.

7 See Still v. Ruby, 35 Pa. St. 373, 374.

8 Gill v. Carmine, 55 Md. 339.

9 Avery v. Griffin, Law R. 6 Eq. 606, 608.

10 Pemberton v. Chapman, El. B. & E. 1056, 1067; *post*, § 486.

11 Stewart, 56 Me. 300, 301.

12 *Post*, § 483.

13 *Post*, §§ 484-487.

§ 483. Some general rules as to married women in representative capacities.—With regard to the questions already stated,<sup>1</sup> certain general rules may be formulated, to wit:—

1. *As to husband's consent.* At common law, a husband not only took his wife with all her accrued obligations,<sup>2</sup> but he was also jointly liable with her for her torts, whether committed with his consent or not,<sup>3</sup> and was therefore liable for all her breaches of trust, devastavits, etc.;<sup>4</sup> so that for his own protection he had the right to say whether she should act in a representative capacity, and subject him to such additional risks.<sup>5</sup> But his consent was necessary only so far as his liabilities were concerned<sup>6</sup>—he could not, for example, object to her executing a power to convey property;<sup>7</sup> and for this reason, it would seem that his right to object at all is removed by statutes destroying his marital liability for the acts of his wife.<sup>8</sup>

2. *As to wife's coverture.* The fact that a wife has no personal capacities, but is under the disabilities of coverture, does not prevent her acting in a representative capacity;<sup>9</sup> she may be an agent,<sup>10</sup> administratrix or executrix,<sup>11</sup> trustee,<sup>12</sup> or guardian;<sup>13</sup> it only affects her personal rights and obligations while acting in such capacities.<sup>14</sup> A married woman is not in this respect like an idiot; she has as much discretion after as before marriage.<sup>15</sup>

3. *As to personal rights and obligations of wife.* The fact that a married woman may act in a representative capacity, and is so acting, does not enlarge her personal capacities, or remove, as far as she is herself concerned, her marriage disabilities, or affect her personal status.<sup>16</sup> Her contracts, though made in her own name, do not bind her personally, unless she has the capacity to contract personally;<sup>17</sup> so she may be unable to stipulate for any compensation.<sup>18</sup> For her torts she is, of course, personally liable, for a married woman is not even at common law under disability to commit wrongs.<sup>19</sup>

4. *As to her husband's rights and obligations.* A husband has no property or estate in funds held by a married woman in a representative capacity.<sup>20</sup> He generally sues and is sued with her for conformity;<sup>21</sup> and on contracts on which if sole she could have declared in her own name, he could at common law sue alone.<sup>22</sup> For all her devastavits and acts in the nature of tort he is jointly liable with her,<sup>23</sup> in accordance with the rules already discussed relating to a husband's liability for his wife's torts.<sup>24</sup> He is liable for her contracts only if she acted as his agent.<sup>25</sup> He must account for any money which passes into his possession.<sup>26</sup>

5. *As to the estate or principal.* The estate or person whom the wife represents is bound, and receives the benefit of her acts just as if she were sole;<sup>27</sup> her conveyance in accordance with her powers,<sup>28</sup> or her receipt for funds,<sup>29</sup> is binding as if on him.

6. *As to third parties.* The rights and obligations of the persons with whom she deals as representative are the same, as far as the person or estate which she represents is concerned, as if she were sole;<sup>30</sup> but as far as she herself is concerned, they are simply such as may exist against any married woman.<sup>31</sup>

1 *Ante*, § 482.

2 Discussed *ante*, §§ 66, 67.

3 *Ferguson v. Collins*, 8 Ark. 241, 252; *ante*, § 66.

4 *McWilliams*, 1 Schoales & L. 163, 173; *Adair v. Shaw*, 1 Schoales & L. 243, 263, 266, 272; *Pemberton v. Chapman*, 7 El. & B. 210; *El. B. & E.* 1056, 1060; *Clough v. Bond*, 3 Mylne & C. 430, 439; *Smith*, 21 Beav. 335, 387; *Kingham v. Lee*, 15 Sim. 306, 401; *Kearsley v. Okley*, 2 Hurl. & C. 836, 900; *Loody v. Turnbull*, Law R. 1 Ch. App. 494, 498; 34 Law J. N. S. Ch. 533; *Derbyshire v. Home*, 5 DeGex & S. 702, 709; 3 DeGex, M. & G. 89; *Taylor v. Allen*, 2 Atk. 212, 213; *Bubbers v. Harby*, 3 Curt. 50; 7 Ex. 363; *Trust v. Sedgwick*, 97 U. S. 304, 309; *Bohe v. Frowner*, 18 Ala. 83, 95; *Kavanaugh v. Thompson*, 16 Ala. 817, 823; *Carlisle v. Tuttle*, 10 Ala. 613, 624; *Moffit v. Commonw.*, 5 Pa. St. 359, 363; *Tabb v. Boyd*, 4 Call. 453, 457; *Moon v. Henderson*, 4 Desaus. Eq. 459, 461; *Knox v. Pickett*, 4 Desaus. Eq. 92, 93; *Allen v. McCullough*, 2 Heisk. 174, 193; 5 Am. Rep. 27; *McCreedy*, 1 Tuck. 374, 376.

5 *Dye*, 2 Robt. 342, 344; *Pemberton v. Chapman*, 7 El. & B. 210, 218; *El. B. & E.* 1056, 1060; *Clarke*, Law R. 6 P. D. 193, 194; *Adair v. Shaw*, 1 Schoales & L. 243, 266; *English v. McNair*, 34 Ala. 40, 48, 49; *Stewart*,

56 Me. 300, 301; Palmer v. Oakley, 2 Doug. (Mich.) 433, 468; *supra*, n. 4.

6 Pemberton v. Chapman, El. B. & E. 1056, 1067.

7 See Claussen v. La Franz, 1 Iowa, 226, 234; *ante*, §§ 202, 212.

8 Consult *ante*, § 66.

9 1 Perry Trusts, § 48; Story Agency, § 7; 2 Williams Executors, 965.

10 Discussed *post*, § 484.

11 Discussed *post*, § 485.

12 Discussed *post*, § 486.

13 Discussed *post*, § 487.

14 See Pemberton v. Chapman, El. B. & E. 1056, 1068; Avery v. Griffin, Law R. 6 Eq. 606, 608; Tucker v. Cocke, 32 Miss. 184, 189.

15 Bell v. Hyde, Prec. Ch. 350.

16 See Russel, 5 Coke, 27 b; Pemberton v. Chapman, El. B. & E. 1056, 1068; Hazelbaker v. Goodfellow, 64 Ill. 238, 241; Abbey v. Deyo, 44 Barb. 374, 380; Tucker v. Cocke, 32 Miss. 184, 189; Andrews v. Ormsbee, 11 Mo. 400, 402; Tuttle v. Hoag, 46 Mo. 41, 42; 2 Am. Rep. 481; Carleton v. Haywood, 49 N. H. 314, 320; Still v. Ruby, 35 Pa. St. 373, 374; *ante*, § 482.

17 Tuttle v. Hoag, 46 Mo. 41, 42; 2 Am. Rep. 481.

18 Hazelbaker v. Goodfellow, 64 Ill. 238, 241; *ante*, § 65.

19 Discussed *ante*, §§ 66, 421-425.

20 Workford, 1 Salk. 306; Claussen v. La Franz, 1 Iowa, 226, 234; Roberts v. Place, 18 N. H. 153, 184.

21 Still v. Ruby, 35 Pa. St. 373, 374; *ante*, §§ 439, 440.

22 Ankerstein v. Clarke, 4 Term, 616, 617; Yard v. Ellard, 1 Salk. 117; Jenkins v. Plombe, 6 Mod. 93, 94.

23 Cases *supra*, notes 4, 5.

24 *Ante*, § 66.

25 Tuttle v. Hoag, 46 Mo. 41, 42; 2 Am. Rep. 481; *ante*, § 67.

26 Keister v. Howe, 3 Ind. 268, 269.

27 See Russel, 5 Coke, 27 b.

28 Bouldin v. Reynolds, 53 Md. 491, 495; Schley v. McCeney, 36 Md. 266, 273; *ante*, § 212.

29 Pemberton v. Chapman, 7 El. & B. 210, 218; El. B. & E. 1056, 1067.

30 See Russel, 5 Coke, 27 b.

31 See Still v. Ruby, 35 Pa. St. 373, 374.

§ 484. **Married women as agents.**—A married woman may be an agent (subject possibly to her husband's consent<sup>1</sup>), in the sense that her principal and the party with whom she deals for him are bound by any transaction conducted by her, just as if she were sole.<sup>2</sup> Hence, she may execute any power, whether appendant or in gross, without any reference to her covert-

ure.<sup>3</sup> She may act as her husband's agent,<sup>4</sup> and may thus dispose of his property *inter vivos*<sup>5</sup> or by will;<sup>6</sup> she may trade in his place,<sup>7</sup> and be partner for him,<sup>8</sup> and may bind him by her acts, admissions, etc.<sup>9</sup> But she is not personally liable for her acts except as a married woman,<sup>10</sup> and only as such can she acquire personal rights.<sup>11</sup> Though when her earnings belong to her she may contract for compensation for her services;<sup>12</sup> her relation towards her husband may render any such contract with him invalid.<sup>13</sup> When she is agent before marriage, the husband does not by marriage become jointly agent with her.<sup>14</sup>

1 See *ante*, § 483.

2 Story Agency, § 7; *ante*, §§ 89-98, 363.

3 *Schley v. McCeney*, 36 Md. 266, 273; *Bouldin v. Reynolds*, 53 Md. 451, 495; *ante*, §§ 203, 205, 342, 363.

4 Discussed *ante*, §§ 89-98, 348, 469.

5 *Prestwick v. Marshall*, 7 Bing. 555, 567; *Goodwin v. Kelley*, 42 Barb. 194, 196; *ante*, §§ 89-98.

6 *Cutter v. Butler*, 25 N. H. 205, 210; 57 Am. Dec. 350; *ante*, § 348.

7 *Tuttle v. Hoag*, 46 Mo. 41, 42; 2 Am. Rep. 481; *ante*, §§ 93, 463.

8 *Swasey v. Antram*, 24 Ohio St. 87, 95.

9 *Emerson v. Blouden*, 1 Esp. 142, 143; *Hopkins v. Mollineux*, 4 Wend. 465, 467; *ante*, §§ 89-98.

10 *Tucker v. Cocke*, 32 Miss. 184, 189; *Andrews v. Ormsbee*, 11 Mo. 400, 402; *Carleton v. Haywood*, 49 N. H. 314, 320; *ante*, § 351.

11 See *Ankerstein v. Clarke*, 4 Term. 616; *Yard v. Ellard*, 1 Salk. 117; *Jenkins v. Plombe*, 6 Mod. 93, 94.

12 *Adams v. Honness*, 62 Barb. 326, 336.

13 *Ante*, §§ 41-44, 65.

14 *Marder v. Lee*, 3 Burr. 1469, 1471.

§ 485. **Married women as trustees.**—Married women may become trustees by deed, gift, bequest, appointment, or by operation of law;<sup>1</sup> for example, one may be a trustee under a mortgage.<sup>2</sup> A wife cannot, however, be at law trustee for her husband,<sup>3</sup> as they are one person,<sup>4</sup> but in equity she can be trustee for him as for any one else;<sup>5</sup> resulting trusts frequently arise between them.<sup>6</sup> So if an estate comes to a married



woman in any way, charged with a trust, her coverture cannot be pleaded in bar of the trust;<sup>7</sup> if a mere life tenant of personalty, she may be compelled to give bond;<sup>8</sup> she may be compelled to perform the duties of her trust;<sup>9</sup> and her husband has no estate in property in which she has a bare legal title.<sup>10</sup> She cannot, however, bind herself personally in dealing with her trust estate.<sup>11</sup> She and her husband are both liable at common law for her breaches of trust;<sup>12</sup> such acts of hers are treated as torts.<sup>13</sup> Still, a court will not readily appoint a married woman trustee.<sup>14</sup>

1 Perry Trusts, § 48; Trust Co. v. Sedgwick, 97 U. S. 304, 309; Springer v. Berry, 47 Me. 330, 335; Bouldin v. Reynolds, 53 Md. 491, 494; Still v. Ruby, 35 Pa. St. 373, 374.

2 Bouldin v. Reynolds, 53 Md. 491, 494, 495.

3 Mutual v. Deale, 18 Md. 26, 46; Warbeck v. Havens, 42 Barb. 66, 70.

4 *Ante*, § 38.

5 Livingston, 2 Johns. Ch. 541. See 1 Perry Trusts, §§ 48, 51.

6 Discussed *ante*, § 132.

7 Clarke v. Saxon, 1 Hill Ch. 69; Berry v. Norris, 1 Duval, 302.

8 Clarke v. Saxon, 1 Hill Ch. 69, 74.

9 Dundas v. Biddle, 2 Pa. St. 160, 161.

10 Claussen v. La Franz, 1 Iowa, 226, 234; *ante*, § 453.

11 Avery v. Griffin, Law R. 6 Eq. 606, 603; Still v. Ruby, 35 Pa. St. 373, 374; *ante*, §§ 482, 483.

12 Trust Co. v. Sedgwick, 97 U. S. 304, 309.

13 *Ante*, § 483; *post*, § 486.

14 Kaye, Law R. 1 Ch. 387; 1 Perry Trusts, § 51.

§ 486. **Married women as executrices, etc.**—The law on this subject is in a most confused condition, and is controlled in most States by peculiar statutes. Any discussion thereof must therefore be unsatisfactory.

1. *Appointment of married women as.* At common law a married woman could be appointed executrix or administratrix,<sup>1</sup> as her personal disabilities did not incapacitate her from acting in a representative capacity.<sup>2</sup> But on account of the liabilities with which she might thereby invest her husband, she could not be

appointed without his consent.<sup>3</sup> His consent could be given before or after the granting of letters,<sup>4</sup> and in the absence of any evidence that it was given would be presumed;<sup>5</sup> being necessary only on account of his liabilities, it is not necessary when no question of his liabilities could arise.<sup>6</sup> By the ecclesiastical law she was a distinct person from her husband, and his consent was not necessary at all.<sup>7</sup> By statutes in most States she may be administratrix, but usually her husband is required to join with her or to go upon her bond.<sup>8</sup>

2. *Marriage of female executrix.* By the common law a husband, by marrying an administratrix or executrix, consented that she should act as such;<sup>9</sup> and probably, independently of statute, the marriage of a female executrix, etc., in no way affects her authority.<sup>10</sup> It has, however, been said that by the marriage the husband becomes co-executor with his wife;<sup>11</sup> that he administers in her right for his own protection;<sup>12</sup> and that the rights of administration vest in him just as if he had been himself appointed;<sup>13</sup> also, that marriage does not revoke letters, but is only a cause for revocation, even under a statute which requires a new bond, when an administratrix marries.<sup>14</sup> By statutes in many States the authority of a female administratrix ceases with her marriage,<sup>15</sup> but such statutes are not retrospectively construed.<sup>16</sup>

3. *Incidents.* When acting as administratrix, a married woman has, as far as the estate is concerned, the capacities of a *femme sole*,<sup>17</sup> but no additional personal rights or liabilities;<sup>18</sup> she may, for example, give a valid receipt for funds of the estate.<sup>19</sup> Her husband has no rights over the funds of the estate,<sup>20</sup> and if he takes them into his possession it is a devastavit.<sup>21</sup> For all defaults, devastavits, etc., husband and wife are jointly

liable,<sup>22</sup> just as they are for torts in which the wife has some part.<sup>23</sup> The husband's liability has been attributed to his getting possession of the funds,<sup>24</sup> or to his consenting to her acting in the special capacity,<sup>25</sup> but this would not explain her liability; besides, his consent is said to be necessary only because of his liabilities, and these cannot, at the same time, be said to depend on his consent. Although there is considerable difficulty in treating a *devastavit* as a tort, some of the cases suggest this view,<sup>26</sup> and it is the only one by which the authorities can be explained; for usually a married woman is not liable on any contract express or implied,<sup>27</sup> and cannot be made to account for money received by her for another's use.<sup>28</sup> For conformity, the husband generally sues and is sued with his wife;<sup>29</sup> but in cases where she could have declared in her own name if unmarried, he might, at common law, sue alone.<sup>30</sup> A wife may renounce her right to administer against her husband's consent,<sup>31</sup> though it is said that a husband has sometimes the right to administer in right of his wife.<sup>32</sup> As executrix she could, at common law, make a will.<sup>33</sup> Where the husband is, as husband, co-executor, service on him is sufficient.<sup>34</sup> A writ *ne execat* cannot issue against her alone.<sup>35</sup> Her husband stands in a fiduciary relation, and cannot purchase from her co-executor.<sup>36</sup>

1 *English v. McNair*, 34 Ala. 40, 48, 49; *Stewart*, 56 Me. 300, 301; *Palmer v. Oakley*, 2 Doug. (Mich.) 433, 466-468; 47 Am. Dec. 41; 1 *Williams Executors*, 233.

2 See *ante*, § 483.

3 *Dye*, 2 Robt. 342, 344; *Bubbers v. Harby*, 3 Curt. 50; 7 Eng. L. 363; *Pemberton v. Chapman*, 7 El. & B. 210, 218; El. B. & E. 1076, 1060; *Clarke*, Law R. 6 P. D. 103, 104; *Adair v. Shaw*, 1 Schoales & L. 243, 266; *English v. McNair*, 34 Ala. 40, 48; *Stewart*, 56 Me. 300, 301; *Hinds v. Jones*, 48 Me. 348, 350; *Woodruff v. Cox*, 2 Bradf. 153, 155; *ante*, § 483.

4 *Pemberton v. Chapman*, 7 El. & B. 210, 219.

5 *English v. McNair*, 34 Ala. 40, 48.

6 *Pemberton v. Chapman*, El. B. & E. 1056, 1067.

- 7 Palmer v Oakley, 2 Doug. (Mich.) 433, 466; 47 Am. Dec. 41; 1 Williams Executors, 233.
- 8 See English v. McNair, 34 Ala. 40, 48; Whitaker v. Wright, 35 Ark. 511; Claussen v. La Franz, 1 Iowa, 226, 237; Binnerman v. Weaver, 8 Md. 521, 523; Curser, 25 Hun, 579, 580.
- 9 Woodruff v. Cox, 2 Bradf. 153, 154.
- 10 Yates v. Clark, 56 Miss. 212, 216.
- 11 Murphee v. Singleton, 37 Ala. 412, 416; Stewart, 56 Me. 300, 301; Woodruff v. Cox, 2 Bradf. 153, 155.
- 12 Kavanaugh v. Thompson, 16 Ala. 817, 823.
- 13 Kavanaugh v. Thompson, 16 Ala. 817, 823; Wood v. Chetwood, 27 N. J. Eq. 311, 313; Scott v. Gamble, 9 N. J. Eq. 218, 233; Woodruff v. Cox, 2 Bradf. 153, 155; Lindsay, 1 Desaus. Eq. 150, 153; Gates v. Whetstone, 8 S. C. 244, 247; 23 Am. Rep. 284; Airhart v. Murphy, 32 Tex. 131, 134.
- 14 Yates v. Clark, 56 Miss. 212, 216; Cassedy v. Jackson, 45 Miss. 397, 401.
- 15 Wood v. Story, 3 DeGex, F. & J. 125, 126; Whitaker v. Wright, 35 Ark. 511, 516; Teschemacher v. Thompson, 18 Cal. 11, 20; Duhne v. Young, 3 Bush, 343, 347; Fry v. Kimball, 13 Mo. 9, 19, 20; Roberts v. Place, 18 N. H. 183, 184; Field v. Torrey, 7 Vt. 372, 387.
- 16 Fry v. Kimball, 16 Mo. 9, 20.
- 17 Pemberton v. Chapman, El. B. & E. 1056, 1067; *ante*, § 483.
- 18 Russel, 5 Coke, 27 b; Pemberton v. Chapman, El. B. & E. 1056, 1038; *ante*, § 433.
- 19 Pemberton v. Chapman, El. B. & E. 1056, 1067.
- 20 Roberts v. Place, 18 N. H. 183, 184.
- 21 Wankford, 1 Salk. 306.
- 22 Smith, 21 Beav. 385, 387; Kingham v. Lee, 15 Sim. 336, 401; Kearsley v. Okley, 2 Hurl. & C. 896, 900; Loady v. Turnbull, Law R. 1 Ch. App. 404, 408; Derbyshire v. Home, 5 DeGex & S. 702, 709; Woodruff v. Cox, 2 Bradf. 153, 154; *ante*, §§ 66, 483.
- 23 Discussed *ante*, § 66.
- 24 See Pemberton v. Chapman, El. B. & E. 1056, 1060; Keisler v. Howe, 3 Ind. 263, 269; *supra*, n. 21.
- 25 See Adair v. Shaw, 1 Schoales & L. 243, 266.
- 26 See Pemberton v. Chapman, El. B. & E. 1056, 1060; Benyon v. Gollins, 2 Bro. C. C. 323, 324; Woodruff v. Cox, 2 Bradf. 153, 154.
- 27 Discussed *ante*, §§ 357, 368, 381.
- 28 Tucker v. Cocke, 32 Miss. 184, 189; *ante*, § 66, n. 22.
- 29 Wood v. Chetwood, 27 N. J. Eq. 311, 313; *ante*, §§ 439, 440, 483.
- 30 Yard v. Ellard, 1 Salk. 117; *ante*, § 483.
- 31 1 Williams Executors, 234.
- 32 English v. McNair, 34 Ala. 40, 50.
- 33 Cutter v. Butler, 25 N. H. 343, 353; 57 Am. Dec. 330; *ante*, § 341.
- 34 Kavanaugh v. Thompson, 16 Ala. 817, 823.
- 35 Pannell v. Tayler, 1 Turn. & R. 96, 103.
- 36 Pepperell v. Chamberlain, 27 Week. R. 410, 411. But see 2 Williams Executors, 965; *ante*, § 39.

§ 487. **Married women as guardians.**—The capacity of a married woman to be a guardian, and her rights and liabilities as such, depend on the same principles as her capacity to be executrix, and her rights and liabilities as such.<sup>1</sup> When the husband's common-law liabilities exist she cannot be appointed without his consent;<sup>2</sup> but if appointed, such consent is presumed,<sup>3</sup> and though her letters may be revocable, until they are revoked she has full authority.<sup>4</sup> Her common-law disabilities, and her consequent incapacity to bind herself by bond,<sup>5</sup> does not affect her right to be appointed,<sup>6</sup> for her obligors are liable whether she is or not.<sup>7</sup> When a female guardian marries, it is not at all settled that even at common law her husband became guardian in her place,<sup>8</sup> though this has been asserted,<sup>9</sup> and her husband has liabilities similar to those of the husband of an executrix.<sup>10</sup> Even if marriage does revoke her appointment, she may be re-appointed,<sup>11</sup> as above. There seems to be no good reason for supposing that marriage revokes the authority of a guardian; to the objection that she should not be able to expose her husband to additional liabilities without his consent,<sup>12</sup> it may be said that he consents to this by marrying a guardian;<sup>13</sup> to the objection that she cannot bind herself by bond,<sup>14</sup> it may be replied, that the original bond continues of full effect in spite of her marriage;<sup>15</sup> and the objections that she cannot keep her funds separate from her husband,<sup>16</sup> and that she cannot be so easily held personally liable,<sup>17</sup> apply equally to her being appointed guardian. So that, in Maryland, for example, where there is no statute relating to this subject, the marriage of a female guardian would not affect her rights as guardian at all;<sup>18</sup> her authority would not cease, a new bond would not be necessary, and her husband would not have any right to interfere with her guardianship.

- 1 Discussed *ante*, § 436.
- 2 Palmer v. Oakley, 2 Doug. (Mich.) 433, 469 ; 47 Am. Dec. 41 ; Jarrett v. State, 5 Gill & J. 27, 28.
- 3 See English v. McNair, 34 Ala. 40, 48.
- 4 Palmer v. Oakley, 2 Doug. (Mich.) 433, 469, 469 ; 47 Am. Dec. 41.
- 5 English v. McNair, 34 Ala. 40, 51 ; Jarrett v. State, 5 Gill & J. 27, 28.
- 6 Jarrett v. State, 5 Gill & J. 27, 28.
- 7 See Spitz v. Bank, 8 Lea, 641, 643 ; *ante*, § 368.
- 8 Allen v. McCullough, 2 Heisk. 174, 192 ; 5 Am. Rep. 27.
- 9 Martin v. Foster, 38 Ala. 688, 690 ; Field v. Torrey, 7 Vt. 372, 387. See Lindsay, 1 Desaus. Eq. 150, 153.
- 10 Allen v. McCullough, 2 Heisk. 174, 193 ; 5 Am. Rep. 27 ; *ante*, § 486.
- 11 Gornell, 1 Beav. 348 ; Allen v. McCullough, 3 Heisk. 174, 192 ; 5 Am. Rep. 27 ; Field v. Torrey, 7 Vt. 372, 387 (by statute).
- 12 See *ante*, §§ 483, 486.
- 13 Woodruff v. Cox, 2 Bradf. 153, 154.
- 14 Jarrett v. State, 5 Gill & J. 27, 28.
- 15 *Ante*, §§ 67, 365.
- 16 Field v. Torrey, 7 Vt. 372, 387.
- 17 See *ante*, §§ 453, 486.
- 18 See Binnerman v. Weaver, 8 Md. 517, 523 ; Jarrett v. State, 5 Gill & J. 27, 28 ; Palmer v. Oakley, 2 Doug. (Mich.) 433, 470 ; 47 Am. Dec. 41.

# INDEX.





# INDEX.

---

[References are to sections.]

- Abandonment**, of domicile, § 29.  
of homestead, 326.  
of husband by wife bars dower, 269.  
of wife by husband, generally, 60, 90, 91, 167, 332;  
effect of, on wife's status, 332; wife's agency, 90;  
husband's right in wife's personalty, 167.
- Abatement**. See **SUITS**.  
of suits of married women, 77, 79, 340, 434.
- Abduction**, suit for, 78; evidence of wife, 56.
- Absence**, agency of wife during husband's, 90; wife  
head of family during husband's, 60, 90.
- Acceptance**, by a married woman, 385, 391.
- Account**, wife's right to make husband, 42, 53.  
whether married woman liable to, 66, 91, 381, 483.
- Accretion**. See **INCREASE**.  
separate property acquired by, 227.
- Accumulations**. See **INCREASE**.  
of earnings, 65.  
of equitable separate property, 209.  
of statutory separate property, 227. a  
of business, 87, 468-470, 475.  
effect through assistance of husband, 87.
- Acknowledgment**, of married woman's deed, 400, 401.
- Acquiescence**. See **SILENCE**, **GIFT**, **PRESUMPTION**.  
implied gift to husband from, 42, 65, 127, 129, 132,  
209, 213.  
wife estopped by, when, 213, 417.  
wife's appointment of agent by, 84, 121, 213.
- Acquisition**, of domicile, 29.  
of equitable separate property, 197-201.  
of statutory separate property, 220-231.  
marriage contract as to subsequent, 27, 28.  
law of domicile as to subsequent, 27, 28.
- Action**. See **SUITS**, **CHoses IN ACTION**, **CAUSE OF ACTION**.

- Acts.** See STATUTES, CONTRACTS, TORTS, *etc.*  
**Actual domicile,** defined, 27, 29.  
**Adequacy,** of consideration on postnuptial settlement, 106.  
**Administrator,** wife of, no dower, 252.  
    married woman as, 486.  
**Adverse possession,** between husband and wife, 119.  
    against dowress, 290.  
**Adultery,** of wife, effect on dower, 269.  
    of wife, gives husband right of action, 59, 79.  
    a matrimonial offense, 49.  
**Affection.** See ENTICEMENT, LOVE.  
**Affirmance.** See CONFIRMATION.  
**Agency,** in law and in fact, 82.  
    conjugal, discussed, 82-98.  
**Age.** See INFANT.  
**Agent,** husband as wife's, 84-89; in law and in fact, 82, 84; appointment of, 84; scope of authority, 85; proof of authority, 86; compensation, 87; effect of fraud, 87; special instances and illustrations, 88, 121; in business, 87, 475, 480.  
    wife as husband's, 89-98; in law or in fact, 82, 89; appointment of, 89; effect of husband's absence, inability, *etc.*, 90; illustrations of want of authority, 91; scope of authority, 92; in business, 93, 469, 479; or household, 90, 94; for necessities, 95, 96; proof of authority, 97; determination, revocation, *etc.*, of authority, 98; on tort, 66, 423; in contract, 67, 469; in wills, 348.  
    of married woman, generally, 84, 223, 364, 389, 475.  
    married woman as, generally, 89, 363, 469, 479, 484.  
**Agreement.** See SETTLEMENT, CONTRACT, *etc.*  
    to sell or convey, 206, 373, 376, 380, 407.  
    to purchase, 223, 373, 380, 383.  
    as to dower, 266, 267.  
    between husband and wife, 40-46, 97-134, 367.  
**Alien,** dower of, 249.  
    courtesy of, 152.  
**Alienation.** See CONVEYANCE, DEED, FORMS, *etc.*  
    restraints on, in marriage settlements, 204.  
**Alimony.** See "Stewart on Marriage and Divorce."  
**Allowance,** by wife to husband, 42.  
    by husband to wife, 98; as pin money, 188.  
**Alteration,** of married woman's deed, 408.  
**Ambulatory,** whether married woman's will is, 352.

- Amount**, of equity to a settlement, 196.  
     awarded in lieu of dower, 294.
- Annuities**, husband's rights over wife's, 182.  
     dower in, 253.
- Answer**. See **SUIT**.  
     married woman's separate, 211, 461.
- Antenuptial**, settlement, 40.  
     contracts between husband and wife, 44, 266; as to residence, 60; as to marriage rights, 266; effect of, on conflict of laws, 20, 28.  
     guardianship of married woman, 487.  
     executorship of married woman, 487.  
     contracts of married women, 44, 67, 365.  
     torts of married women, 66, 422.  
     wills of married women, 352.  
     trade of married women, 464, 466; partnership, 480.  
     suits of married women, 430.
- Anticipation**, restraints on, 204.
- Apparel**, ownership of wife's, 120, 127, 186, 187.
- Appearance**, of married woman in suits, 211, 452, 460, 461, 462.
- Appointment**, of husband as wife's agent, 84.  
     of wife as husband's agent, 89.  
     of married woman's attorney at law, 462.  
     of executor by married woman, 344.  
     of married woman as guardian, executor, etc., 482, 486, 487.  
     equitable, under powers, 205, 206.
- Arbitration**, husband's submission of wife's rights to, 85;  
     as reduction to possession, 180.  
     wife's submission to, 388.
- Arrears**, of pin money, 189.
- Arson**, wife burning husband's house not, 14, 49.
- Articles of the peace**, wife's right to, 48, 56, 75.
- Assault and battery**. See **TORTS**.  
     between husband and wife, 48, 49, 53, 63; testimony in suits for, 56.  
     wife's right of action for, is property, 219, 230.
- Assessments**, against stock held by married women, 390.
- Assignee**, *bona fide*, for value takes free of fraud or trust, 45, 110, 132, 385; right to impeach deed against, 376, 405.  
     contract of married woman in hands of, 368.
- Assigned dower**, incidents of, 264.

- Assignment**, of contract between husband and wife,  
44.  
of insurance policy, 133.  
deed of, of married woman, 394, 408.  
of husband as reduction to possession, 181.  
by husband of his personalty, 140, 301.
- Assignment of dower**. See DOWER.  
widow's right to, 263, 283.  
who must assign, 284.  
without suit, 285; of and against common right,  
285.  
by suit, 286-288; at common law, 286; at law under  
statutes, 287; in equity, 288.  
proof of right to assignment, 289.  
estoppels against defendant, 290.  
in mansion house, 291.  
by metes and bounds, 292.  
in rents and profits, 293.  
in gross sum, 294.  
in improvements, 295.  
damages at law, 296.  
mesne profits in equity, 297.  
effect of, 298.  
excessive, 299.  
new, 300.
- Assumpsit**, against married women, 66, 91, 381, 483.
- Attorney at law**, husband as agent to employ for wife,  
66, 67, 85, 462, 463.  
wife's, 234, 239, 372, 389, 462, 463.  
compensation of wife's, 463.
- Attorney in fact**. See AGENT.  
wife may join in deed with husband's, 271.  
wife's, cannot make deed, 271, 406.
- Authority**. See AGENT.  
of husband to act for wife, 82, 84; scope of, 85.  
of wife to act for husband, 89, 91; scope of, 90,  
92.
- Award**, against married woman, 388.
- Badges of fraud**. See FRAUD.  
in dealings between husband and wife, 112.
- Banishment**, of husband makes wife a *femme sole*, 342.
- Bank acts**, how far affect liabilities of married women,  
13, 369.
- Bank deposits**, in names of husband and wife, 128.  
husband's right to draw wife's, 169.

- Bankruptcy**, husband's assignment in, does not carry wife's *choses in action*, 181.  
 of husband as discharge of wife's joint liability, 67, 382.  
 of husband gives dower when, 282.  
 conveyance by husband to wife as an act of, 114.  
 wife's testimony in, proceedings against husband, 56.
- Barring curtesy**, discussed, 159.
- Barring dower**, discussed, 265-283.
- Barring equity to settlement**, discussed, 194.
- Bastardy**, statute as to, does not include married women, 13.
- Beating wife**, civil liability of husband for, 47.  
 criminal liability of husband for, 48.
- Bequest**, to married women at common law, 174.  
 property acquired by, 225.
- Bills**. See NOTES.
- Bill of sale**, between husband and wife, 120, 121.
- Birth of issue**, necessary to curtesy, 154.  
 not necessary to dower, 249.
- Blank deed**, of married woman when valid, 270, 364, 400, 402, 407, 412.
- Bonds**, are *choses in action*, 171.  
 husband's rights in wife's, 173.  
 wife's separate, 219, 229.  
 wife's liability on, 384.  
 of conveyance of married women, 206, 407.
- Both**, husband's and wife's property discussed, 302-330.
- Breach of trust**, by married women, 66, 91, 213, 483, 485.
- Burden of proof**, on wife to show gift from husband, 65, 119.  
 in wife to show her title, 119, 132, 232.  
 on party asserting married woman's liability, 237, 357, 431.
- Business**. See TRADE.  
 wife as husband's agent in, 93, 469, 479.  
 husband as wife's agent in, 86, 87, 475, 480.  
 whether apparently joint, is that of husband or of wife, 87, 93, 97, 119, 129, 469; or of both, 480.
- Cancellation of contract**, wife's suit against husband for, 53.
- Capacities of married women**. See STATUS.  
 statutes as to, strictly construed, 12.  
 depend on law of domicile, 30, 35.  
 generally, 331-339.  
 to hold property at common law, 137; in equity, 197-216; under statutes, 217-243.  
 H. & W.—60.

**Capacities of married women** — *Continued.*

to will, 50, 51, 208, 240, 340-354.

to deed, 205, 236, 394-408.

to contract, 40-46, 355-393.

to be surety, 134.

to be estopped, 409-420.

to commit torts, 421-425.

to commit crimes, 426, 427.

to sue and be sued, 428-463.

to trade, 464-481.

to act in representative capacity, 482-487.

**Case.** See TORTS, SUITS.

action on the, for *crim. con.* 79.

**Causa mortis**, gift by married woman, 127, 350.

gift by husband to wife, 127.

**Causes of action**, in suits by married women, 442.

in suits against married women, 453.

**Certificato**, to married woman's deed, 401.

*prima facie* evidence only, 376, 401.

**Change**, of domicile, 28, 32.

of possession between husband and wife, 120.

of realty into personalty, 127, 136, 226.

**Charges in equity**, against equitable separate property, 206, 207; how enforced, 211.

against statutory separate property, 235, 238, 371;  
how enforced, 242, 371.

**Chastise**, husband's right to, wife, 63.**Chattels.** See PERSONALTY.**Chattels real.** See PERSONALTY, REALTY, LEASE.

husband's rights in wife's, 145.

entireties in, 303.

**Checks**, are not delivery, 128.

husband's, on wife's funds, 169.

for deposits by husband and wife, 128.

**Child.** See PARENT AND CHILD.

defined, 1.

right to equity of settlement, 192.

birth of, essential to curtesy, 154; not essential to  
dower, 249.

**Choso in action**, defined, 171; chattels out of possession as, 172; bonds, stocks, notes, etc., as, 173; legacies, etc., as, 174; remainders, possibilities, etc., as, 175; *ex contractu*, 44, 219, 229; *ex delicto*, 219, 230.

husband's rights in wife's, 176; not vested, 22.

**Chose in action** — *Continued.*

wife's rights in, at common law, 176; under statutes, 219, 229, 230.

are "property," 41, 219, 229, 230.

**Citizenship**, of wife of citizen, 39.**Civil damago acts**, wife's rights under, 77, 80.**Civil death**, effect of husband's, on wife's capacities, 334.  
effect of wife's, on husband's curtesy, 156.

effect of marriage like, as to married woman's capacities, 38, 119.

**Civil law**, as basis for law in United States, 7.

as to unity of husband and wife, 38

**Civil wrongs.** See TORTS.

between husband and wife, 47, 48.

**Clerk.** See AGENT.

of married women, 84, 223, 364, 475.

husband as wife's, 87.

**Clothing**, as paraphernalia, 183.

as necessities, 90, 94, 95.

**Co-contractors**, with married women liable, 223, 368.**Codes**, as basis of law in the United States, 7.**Codicil.** See WILL.

of married woman, 353.

**Coercion**, of wife by husband, generally, 62, 66, 68, 110,  
121, 213, 331, 417; as to torts, 63, 423; as to crimes,  
68, 427; as to estoppel, 121, 213, 417; with fraud,  
40, 110, 133, 134, 213, 384, 405.**Cohabitation**, marriage duty of, 14, 59.**Comity**, foreign law recognized by, 24.**Common courts**, married woman's liability on, 381.**Common law.** See *passim*.

as basis of law in United States, 6, 8, 9.

**Common property**, of husband and wife, 302-311; dower  
in, 254; curtesy in, 155.**Common recovery**, conveyance by, 394.**Community property**, of husband and wife, generally,  
312-319; where system exists, 7, 313; conflict of  
laws as to, 319; history of, 312; statutes relating  
to, described, 313; what is, 314; husband's rights  
over, 315; wife's rights over, 316; creditor's rights  
over, 317; effect of divorce or death, 318.**Compensation**, contract for, between husband and wife,  
65, 82, 475.

of husband as wife's agent, 87.

of married women's attorneys, 463; agents, 389.

- Competency.** See WITNESS, EVIDENCE.  
 of husband and wife to testify, 56.  
 to testify depends on law of forum, 35.
- Compromise,** of married woman's claims, 85, 388.
- Conditional estates,** dower in, 254.
- Conditions,** binding on married women, 223, 254.
- Confidential communications,** between husband and wife, 56.
- Confirmation,** of married women's contracts, 366, 368.  
 of married women's deeds, 23, 339, 402-404.  
 of deed by infant married woman, 339.  
 of husband's agency by wife, 84.  
 of wife's agency by husband, 89, 93, 94.  
 of marriage by legislature, 23.
- Conflict of laws,** meaning of phrase, 10, 19, 24, 26.  
 past and present law, 19-23.  
 home and foreign laws, 24-37.  
 as to husband's estate *jure uxoris*, 33.  
 as to curtesy, 33.  
 as to dower, 33, 248, 275.  
 as to election, 274, 275.  
 as to community property, 319.  
 as to married women's contracts, 37, 377.  
 as to married women's wills, 36, 354.  
 as to status, 30.  
 as to immovables, 33.  
 as to movables, 31.  
 as to acts, 34.  
 as to procedure, 35.
- Congress,** no power to pass marriage laws, 9.
- Conjugal agency,** discussed, 82-98.
- Conjugal kindness,** defined, 58.
- Conjugal rights and obligations,** discussed, 57-81.
- Consent.** See AGENCY, CONTRACT, JOINDER, etc.  
 of husband to wife's will, 348; trade, 469; contracts, 238, 371; conveyances, 203, 213, 214; estoppel by, 419.  
 of wife to husband's using her property, 42, 87.
- Consideration,** in dealings between husband and wife, 40, 104-108; necessity of, 104; absence of, as fraud, 106; kinds of, 105; marriage as, 44; cohabitation as, 59; release of dower, etc., as, 105, 271; adequacy of, 106; effect of, 107; proof of a different, from that stated, 105.  
 valuable, defined, 105.



**Consideration** — *Continued.*

- good, defined, §§ 105, 108.
- sufficiency of moral, 366.
- none presumed in quit-claim deed, 108.
- for contract of suretyship, 134.
- married woman need restore, when, 267, 339.

**Conspiracy**, by husband and wife, 68.**Constitutional provisions**, against retrospective laws, 21.

- self-executing, 218.

**Construction of statutes.** See RULES, etc.

- general rules, 11-18.
- retrospective and prospective, 17, 20, 65, 67, 268, 308, 378.

- local and foreign, 18.

- as to contracts between husband and wife, 43.

- as to married women's contracts, 339, 378.

**Constructive possession**, as between husband and wife, 119, 120, 168, 169.**Consummate**, dower, 263, 264.

- curtesy, 151, 156.

**Contempt**, married woman guilty of, 211.**Contracts between husband and wife**, discussed, 40-46, 99-134, 367; causes affecting validity of, 40, 101; at common law, 41; in equity, 42; under statutes, 14, 15, 43, 87, 267, 367, 479; antenuptial, 44, 266; forms of, 102, 103; consideration in, 104-108; fraud in, 109-112, 121; remedies on, 122-124.

- particular kinds of, 125-134; deeds, 43, 102, 125; jointure, 126, 267; parol gifts, 127; delivery of, 120; bank deposits, 128; services, 65, 87, 130; earnings, 65; compensation, 87; execution of powers, 203.

**Contracts of married women**, discussed, 355-408.

- liability of husband for, 14, 67, 238, 371.

- liability of wife on antenuptial, 67, 365, 453.

- home and foreign law as to, 37, 377.

- present and past law as to, 22, 378.

- generally invalid, 203, 357; void, not voidable, 368; cannot be confirmed, 366, 368; no estoppel through, 415; wife may sue on, when, 368.

- exceptional validity of, at common law, 358.

- validity of, in equity, 203, 207, 360, 368, 371.

- as to equitable separate property, 206, 207, 360.

**Contracts of married women—Continued.**

validity of, under statutes, §§ 43, 361, 369-378 *a*; general acts not mentioning married women, 13, 369; married women's separate property acts, 237-239, 362, 370-373; in equity as charges, 238, 362, 371; under implied powers, 372; under express powers, 373; "with respect" to, etc., property, 239, 373; statutes authorizing certain contracts, 374; statutes prohibiting certain contracts, 374; statutes authorizing contracts of married women, generally, 375; statutes requiring formalities, 376; statutes authorizing trade, 475, 479.

estoppel through, 415.

property acquired by, 229.

special kinds of, 379-393; *in personam* and *in rem*, 379; executory and executed, 380; express and implied, 381; with husband, 40-46; jointly with husband, 382; antenuptial, 67, 365; made through agents, 364; purchases and sales, 223, 383; covenants and bonds, 384; promissory notes, 223, 375, 385; releases and receipts, 386; leases, 147, 224, 233, 234, 239, 372, 377; for repairs, 238, 239, 371, 372, 387; for family expenses, 387; cultivation, 239; arbitration, 388; for employment of agents, etc., 389, 433; as agent, 363, 483; as stockholder, 390, 481; as trader, 392, 475, 479; as corporator, 481; as surety, 134, 391; for insurance, etc., 393; deeds, 394-408; powers of attorney, 406; agreements to convey, 206, 373, 376, 380, 407; agreements to buy, 223, 373, 380, 383.

**Control, of wife by husband, 60, 110.**

of equitable separate property by wife, 203; by husband, 212.

of statutory separate property by wife, 233; by husband, 243.

**Conversion, of realty into personalty, etc., 31, 33, 127, 136, 226, 261, 280; by husband and wife, 66.****Conveyances. See DEEDS, DISPOSITION.**

defective, how cured, 23, 402-404.

between husband and wife, 41, 42, 125.

by married women generally, 397-408; of equitable separate property, 204, 208, 376, 397; of statutory separate property, 236, 376, 398; at common law, 376.

**Coparcenary estates, dower in, 254.**

curtesy in, 155.

- Corporation**, shares in, immovable property,  $\frac{2}{3}$  33.  
 shares in, whether realty, 253.  
 shares in, *choses in action*, 173.
- Corporator**, married woman's capacity to be, 381.
- Corpus of realty**, married woman's powers over, 205, 206, 236, 372, 376, 397, 398.
- Costs**, in married women's suits, 437, 463.
- Cotnants**, husband and wife as, 302-311.
- Counsel**, wife's, employed by husband, 66, 67, 85, 462, 463;  
 by wife, 234, 239, 372, 389, 462, 463; compensation of, 363.
- Counsel fees**, in married women's suits, 437, 463.
- Country**. See **CONFLICT OF LAWS**.
- Covenants**, of married women, 373, 384, 412; for rent, 53.  
 estoppel by, in deeds, 412.
- Coverture**. See **CAPACITY**, **STATUS**, etc.  
 defined, 33, 331.  
 effect of, generally, 331-339; on property rights, 184;  
 on personal rights, 57-81; on personal status, 331;  
 on wills, 340; on contracts, 350; on estoppels,  
 410; on torts, 421; on crimes, 426; on suits, 431;  
 on trade, 465.  
 and infancy, 339.  
 plea of, 411, 455, 457.
- Credit**, wife's pledge of husband's, 64.  
 husband not liable when all, given to wife, 89, 93,  
 94, 206.  
 married woman's purchase on, 223, 239, 372, 383.  
 married woman's trade on, 468, 475.
- Creditor**, relation of debtor and, between husband and wife, 45.
- Creditors**, fraud on husbands, in dealings between husband and wife, 40, 41, 105-118.  
 who are, 115.  
 rights of, when vested, 65, 67.  
 remedies of, 124.  
 husband's rights to wife's earnings, 65; to mingled property, 129; to increase of wife's property on which husband has labored, 87; in wife's personality, 170; *choses in action*, 177; equitable separate property, 212; statutory separate property, 243; community, 316, 317; homestead, 330; business, 476, 477.  
 as against husband's, wife must prove her title, 119, 223.

**Creditors** — *Continued.*

remedies of wife's, against her, §§ 211, 241, 242, 372, 379, 476.

**Crimes**, between husband and wife, 49.

of married women, 68, 426, 427; husband's liability for, 68; wife's liability for, 426; proof of wife's guilt, 427.

**Crim. con.**, husband's suit for, 79.**Crop**, of wife's separate lands, is hers, 87, 227.**Cruelty**, wife's right against husband for, 47, 48, 49

husband's right against wife for, 49.

wife whipping is, 63.

**Cultivation**, married women's contracts for, 239, 272, 273.

as farming, 465, 475.

**Curative acts**, validity of, 23, 376, 403.**Curtesy**, discussed, 151-162.

defined, 151.

distinguished from estate *jure uxoris*, 143, 146, 151.

requisites of, 152; marriage, 153; birth of issue, 154; seisin, 155; death, 156.

on what property it exists, 157.

incidents of, estate, 158.

initiate, 151, 158; whether a vested estate, 22, 162.

consummate, 151, 158.

how barred, 159.

effect of statutes on, 161; married women property acts, 162.

effect of agreement on, 159.

effect of wife's will on, 162, 344.

**Custody**, husband's right to, of wife, 62.**Custom**, trade of married women by, 467.

deeds of married women by, 270.

**Damages**, wife's right to, against husband, 47, 48.

as wife's separate property, 230.

wife's liability in, 375.

in suits for torts by wife, 77.

in suits for enticement, 78.

in suits for *crim. con.*, 79.

in suits for dower, 296.

husband's right to, against wife, 48.

husband's right to, consequential, 77.

**Dealings between husband and wife**, discussed, 99-134.**Dealings of husband for wife**, discussed, 82-88.**Dealings of wife for husband**, discussed, 89-98.

- Dealings of wife in trade**, discussed, 22 473-481.
- Death**, law at time of, fixes right of heir, devisee, etc., 20, 22, 31, 32, 36, 50, 248, 354.  
 as a requisite of curtesy, 156.  
 as a requisite of dower, 251.  
 effect of, on estate by entireties, 306; community property, 318; wife's choses in action, 44, 55, 170, 176; wife's suits, 56, 434; on estate *jure uxoris*, 146; on equitable separate property, 214; on clauses against alienation, 204; on marriage estate generally, 138.  
 effect of husband's, on wife's will, 353; on wife's contract, 368.
- Debtor and creditor**. See CREDITORS.  
 husband and wife as, 42, 45.
- Debts**, wife's assumption of husband's, 134.  
 do not include claims for torts, 66.
- Deceit**. See FRAUD.
- Decisions collected**, as to contract between husband and wife, 46.  
 as to wife's suretyship, 134.  
 as to necessities, 96.  
 as to contracts of married women, 378 *a*.
- Declaration**, of wife as husband's agent, 56.  
 of husband as wife's agent, 86.  
 in married women's suits, 442, 453.
- Declaratory of existing law**, statutes, how construed, 12, 16, 43, 345.
- Dedication to public uses**, effect of, on dower, 278.
- Deeds**, of separation, 40, 42.  
 of settlement, 125.  
 in fraud of creditors, 99-124; do not carry property previously assigned in fraud, 100; a wife's choses in action, 181.  
 of infant married woman, 335, 339.  
 effect of, to husband and wife jointly, 304.  
 of married women, 394-408; at common law, 376, 394; when abandoned by husband, 358; under statutes, 395; of dower, 270-272, 396; of equitable separate property, 205, 376, 397; of statutory separate property, 236, 376, 398; joinder of husband, 399; acknowledgment, certificate, etc., 400, 401; confirmation of defective deed by wife, 339, 366, 368, 402; by statute, 23, 403; by equity, 123, 205, 236, 270, 272, 359, 368, 376, 404; impeachment of,

**Deeds — Continued.**

§ 405; powers of attorney, 406; agreements for, 407; various points as to, 408.

estoppel by, 412.

**Defamation, between husband and wife, 48, 49.**

by wife, 66.

of wife, 77.

**Defeating, modes of, curtesy, 159.**

modes of, dower, 265-282.

**Defective deeds, curing of, by party, 339, 366, 368, 402;**

by statute, 23, 403; by equity, 123, 205, 236, 270, 272, 359, 363, 376, 404.

**Defenses, against married women, 443-445.**

by married women, 454-456; how made, 461.

between husband and wife, 55 *a.*

in suits for *crim. con.*, 79.

**Definitions, "acquired," 220.**

"agent," 82.

"child," 1.

"chose in action," 171.

"conjugal rights," etc., 57.

"contract," 355.

"coverture," 38, 331.

"curtesy," 151.

"dower," 244.

"earnings," 465.

"equitable separate property, 197.

"estate," 135.

"estates of husband and wife," 3.

"estoppel," 409.

"exchange," 226.

"*femme covert*," 38, 331.

"general statutes," 12.

"gift," 224.

"grant," 224.

"held," 220, 221.

"household furniture," 219.

"husband," 1.

"improvements," 295.

"marriage," 1.

"matrimonial domicile," 29.

"parent and child," 1, 5.

"personal rights," 219.

"postnuptial settlements," 99.

"property," 44, 65, 87, 219, 222, 229, 230.

**Definitions — Continued.**

"purchase," § 223.

"retrospective," etc., 19.

"status," 4.

"wife," 1, 5.

new, of married woman's deed, 402; by husband, 405.

**Delivery**, between husband and wife, 120, 127.

check not a, 128.

necessary to a gift, 118 *a*, 127.

**Deposits**, of husband and wife in bank, 128.

**Depreciation**, in dower lands, 295.

**Derogation of common law**, statutes in, 16.

**Descent**, property acquired by, 225.

**Desertion**. See **ABANDONMENT**.

**Determinable fees**, dower in, 254.

**Detinue**, by wife against husband, 54.

**Devise**, in lieu of dower, 274.

wife's rights in, 174, 225.

**Disabilities**. See **CAPACITY**, **STATUS**, etc.

for protection of married women, 338.

double, 271, 339.

**Disaffirmance**, by infant married woman of deed, 339.

**Discharge**, of contracts by marriage, 44.

of torts by marriage, 48.

**Disposition**. See **WILL**, **DEED**, etc.

right of, incidental to ownership, 205, 206, 236, 372.

includes all kinds of dispositions, 372; encumbering, 204, 206, 236, 238, 372.

restraints on power of, 204.

**Distributive share**, a chose in action, 169.

husband's rights in wife's, 174, 225.

is "property," 225.

**Dividend**, on married woman's stock, to whom payable, 33, 179.

**Divest**. See **VESTED RIGHTS**.

**Divorce**. See "Stewart on Marriage and Divorce."

suits, 48, 73, 434.

effect of, on marriage estate generally, 138; estate *jure uxoris*, 146; curtesy, 152, 159; dower, 281;

entireties, 309; equitable separate property, 215;

on wife's status, 333.

**Domestic arrangements**, husband regulates, 60.

wife as husband's agent in, 94, 95, 97.

**Domicile**, matrimonial, defined, § 29.

law of, when governs, 30, 31, 32, 36, 37.

effect of change of, 32.

husband's, is wife's, 60.

**Donatio.** See **GIFT**.

*mortis causa* of married woman, 350.

**Dos**, under civil law, 245.

**Dos de dote peti non debet**, discussed, 255.

**Doubledisability**, discussed, 271, 339.

**Dower**, discussed, 244-300.

nature and incidents of, 244-264; defined, 244; history, 245; at common law, 246; under statutes, 247; conflict of laws as to, 33, 248; requisites of, 249-252; marriage necessary to, 250, 281; husband's death necessary to, 251; husband's seisin necessary to, 252; nature of property in which, may exist, 253; kinds of estates subject to, 254; out of dower lands, 255; in equitable estates, 256; in partnership estates, 257; priorities between, and other encumbrances, 258; and purchase money, 259; in mortgaged property, 260, 261; inchoate, 262; consummate, 263, 264; before assignment, 263; after assignment, 264.

barring and defeating, 265-282; general modes of, 265; antenuptial agreement, 266; postnuptial agreement, 267; act of husband, 268; act of wife, 269; release of, 270-272, 396; jointure, 273; devise in lieu of, 274; election, 275; estoppel, 276; limitations, 277; dedication to public use, 278; termination of husband's estate, 279; legal proceedings, 280; divorce, 281; bankruptcy of husband, 282.

assignment of, 283-300; widow's right to, 283; who must assign, 284; without suit, 285; suit at common law, 216; suit at law under statutes, 287; in equity, 288; proof of right to, 289; estoppels against defendant, 290; in mansion house, 291; by metes and bounds, 292; in rents and profits, 293; in gross sum, 294; in improvements, 295; in depreciated property, 295; damages, 296; mesne profits, 297; effect of, 298; excessive, 299; eviction and reassignment, 300.

deed of, 270-272, 396.

**Duality.** See **UNITY**.

of husband and wife in equity, 38, 42.



- Duress.** See COERCION.
- Dwelling house.** See HOME.  
dower in, § 291.  
marriage right to occupy, 59, 60.
- Dying declarations,** of husband or wife, 56.
- Earnings of married women,** ownership of, generally, 65.  
mingled with husband's, 87, 129.  
as separate property, 228.  
in trade, 465, 473.  
defined, 465.
- Easement,** created by estoppel, 416.
- Ejectment.** See SUIT.  
by wife against husband, 48, 53.  
by married woman to recover lands seized under void judgment, 411; conveyed by void deed, 412.
- Election,** by widow, 125, 266, 267, 273, 275; discussed fully, 275.  
by wife between, holding property as statutory or as equitable separate estate, 216.
- Elopement,** dower, when barred by, 269.
- Emblements,** husband's right to, in wife's life estate, 144, 147.  
husband's, tenant's right to, in wife's real estate, 147.
- Eminent domain,** right of, superior to dower, 278.
- Employment.** See AGENCY, COMPENSATION.  
of agent by married woman, 87, 389.  
of counsel by married woman, 389, 463.
- Encumber,** power to, included in power to dispose, 204, 372, 408.
- Encumbrance,** inchoate dower is, 262.  
priorities of, with respect to dower, 258.  
wife's separate property bound by, 223.
- Endorse.** See INDORSE.
- Enforcing rights.** See PROCEDURE.
- Enticement,** husband's right of action for, of wife, 77.  
wife's right of action for, of husband, 77, 78; is property, 219.
- Entireties,** estate by, discussed, 304-310.  
at common law, 304; under married women's property acts, 308; under statutes destroying joint estate, 13, 307.  
property subject to estate by, 305.  
incidents of estate by, 306.  
effect of divorce on, 309.  
rights of tenants by, vested, 22.  
H. & W.—61.

- Equitable estates**, dower in, § 256.  
 curtesy in, 157.  
 entireties in, 305.  
 husband's rights in wife's, 197, 199.
- Equitable jointure**, discussed, 126, 266, 267, 273.
- Equitable separate property**, of married women generally, 197-216.  
 defined, 197; distinguished from statutory, 216, 217.  
 creation of, 199, 200; the intent of the settlor to exclude husband, 199; words showing that intent, 200; what husbands are excluded, 201.  
 trustee of, 202.  
 wife's control over, 202; restraints on alienation, 203.  
 disposition of, *inter vivos*, 205, 397.  
 disposition of, by will, 208, 344.  
 contracts charging, 206, 207, 360, 371.  
 trading with, 468.  
 rights to increase, profits, etc., 209, 468.  
 remedies for and against, 210, 211.  
 husband's rights in, 212; estate *jure uxoris*, 148, 149;  
   curtesy, 157; personality, 164.  
 husband's creditors' rights in, 212.  
 how lost, destroyed, etc., 213.  
 effect of death on, 214.  
 effect of divorce on, 215.  
 effect of statutes on, 216.
- Equity**. See *various titles*.  
 jurisdiction of, over married women, 337; married women's equitable property, 197-216; married women's statutory property, 235, 371; married women's wills, 343; married women's contracts, 42, 359, 368, 371; married women's deeds, 404; married women's trade. 468.  
 as to laws of husband and wife, 8.  
 as to unity of husband and wife, 8, 38, 44, 54, 119, 137, 359.  
 as to fraud between husband and wife, 110.  
 as to fraudulent conveyances from husband to wife, 124.  
 gifts between husband and wife in, 127; contracts, 42.  
 resulting trusts between husband and wife, 132.  
 treats realty as personality, etc., when, 136.

**Equity — Continued.**

suits of married women in, § 432; against husband, 53.

remedies *in rem* in, 206, 211, 359.

settlements enforced in, 123, 125.

rectifying, reforming, etc., of married woman's contract or deed in, 123, 205, 236, 270, 272, 359, 368, 376, 401, 404, 407.

statutes declaratory of, 12, 216.

**Equity of contribution**, of dowress, 261.

**Equity of exoneration**, of married woman surety for her husband, 134.  
of dowress, 261.

**Equity of redemption**, dower in, 256, 260, 261.  
widow's, as to husband's lands, 261.

**Equity of settlement**, wife's, discussed, 53, 190-196.  
defined, 190.  
enforced by what courts, 191.  
enforced on whose application, 192.  
enforced out of what property, 193.  
enforced under what circumstances, 194.  
on whom settled, 195.  
amount of, 196.

**Escrow**, delivery of marriage settlement in, 125.

**Establishment**. See HOME, HOUSEHOLD.

**Estates**, defined, 135.

in personalty, 135, 136, 303.

distinguished from rights, 256.

in which dower exists, 254.

in which curtesy exists, 157.

**Estates of husband and wife**, defined, 3.

discussed, 135-330.

in general, 135-139.

husband's, in his own property, 140.

husband's, in wife's realty, 141-162; in general, 141-145; *jure uxoris*, 145-150; curtesy, 151-162.

husband's, in wife's personalty, 163-183; in general, 163-165; choses in possession, 166-170; choses in action, 171-183.

wife's, in her own property, 184-243; in general, 184, 185; paraphernalia, 186, 187; pin-money, 188, 189; equity of settlement, 190-196; equitable separate property, 197-216; statutory separate property, 217-243.

wife's, in her husband's realty, dower, 244-300.

**Estates of husband and wife—Continued.**

wife's, in husband's personalty, § 301.

husband's and wife's, in property of both, 302-330;  
in general, 302-311; entireties, 304-309; joint and  
common, 310, 311; community, 312-319; home-  
stead, 320-330.

**Estoppel, defined, 409.**

of defendant in dower to deny husband's title, 290.  
seal making gift good by, 127.

of husband from denying wife's agency, 89, 98.

**Estoppels of married women, discussed, 339-368, 409-420.**

defined, 409, 410.

general rules as to, 410.

by record, 411, 457.

by deed, 271, 272, 412; by release, 386; by seal 384.

*in pais*, 413-418; defined, 413; general rule, 414;  
contracts, 415; false representations, 416; silence,  
etc., 84, 121, 213, 417, 419; torts, 418.

acts of wife in which husband joins, 419.

acts of wife through agent, 84, 475.

by deed of dower, 271, 272.

by acts of wife after discovery, 290, 420.

**Estovers, husband's right to, 147, 153.**

dower in, 253.

**Eviction, from dower land, 300.****Evidence. See PRESUMPTIONS, PROOF, WITNESS.**

competency of, depends on law of forum, 35.

husband and wife as witnesses for and against each  
other, 56.

confession of wife as, in action for *crim. con.*, 79.

of agency, 85, 86, 97.

to establish relation of debtor and creditor between  
husband and wife, 45.

of fraud, 112.

of right to dower, 289.

possession as, of title, 118 *a*-121.

**Ex contractu. See CHOSSES IN ACTION, CONTRACTS.****Ex delicto. See CHOSSES IN ACTION, TORTS.****Ex post facto laws, discussed, 21.****Examination, privy, for married woman's deed, 400.****Excessive, assignment of dower, 299.**

intercourse, 59.

**Exchange, wife's rights in her property acquired by, 226;**

is equivalent to purchase, 223.

wife's dower in husband's lands by, 254.

- Executor**, wife's property held by husband as,  $\frac{2}{3}$  168.  
 husband's co-liability with wife who is, 66, 486.  
 married woman as, 486.
- Executory contracts**, of married women generally, 206, 380, 407; for purchase of property, 223, 383; for sale of property, 206, 407.
- Exemption**, husband may convey to wife property within, laws, 118.  
 laws discussed, 320-330.
- Existing creditors**, rights of, in case of transfer from husband to wife, 110, 113-118.
- Existing rights**, statutes affecting, 20.
- Expenses**, of married women's suits, 437, 463.
- Expressio unius est exclusio alterius**, discussed, 12, 16, 43, 204, 220, 236, 345, 371, 373, 374.
- Extra territorial effect**, of statutes, 30, 33.
- Fact**, agency in, 82, 84, 85, 94, 97.  
 fraud in, 87, 112.  
 seisin in, 155, 252  
 whether business is wife's, a question of, 87.  
 to whom credit given, a question of, 89.  
 scope of agent's authority, a question of, 85.
- False and fraudulent representations**, married woman's liability for, 66, 423, 424; of agent, 93.  
 married woman's estoppel by, 416.  
 husband's liability for wife's, 66.
- Family**, husband as head of, 60.  
 wife as head of, 90.  
 expenses, liability for, 206, 223, 381, 387.  
 home, husband's right to fix, 60.  
 name, wife's right to use, 61.
- Fee-simple estates**, dower in, 254.
- Fees**, of married women's attorneys, 372, 463.
- Femme covert**. See WIFE, COVERTURE.  
 defined, 38, 331.
- Femme sole**. See CAPACITIES.  
 wife acts as, in executing powers, 205; as to equitable separate property, 203, 206.  
 status of married women as, 332-338.  
 wills of married women as, 342.  
 contracts of married women as, 358, 372, 375.  
 trade of married women as, 466.
- Fiction of unity of husband and wife**, discussed, 38, 39.
- Fine and recovery**, conveyance of married woman by, 205, 394; dower barred by, 270.

**Food.** See NECESSARIES.

**Foreign.** See CONFLICT OF LAWS.

**Forfeiture**, of married woman under general act, § 13.

**Formalities**, conflict of laws as to, 28.

in marriage settlements, 102, 103.

as to contracts and deeds of married women, 374, 376, 395, 400.

in execution of married woman's deed, 400, 401.

as to married woman trader, 472.

**Forum.** See PROCEDURE.

when law of, governs, 35, 37, 435.

**Fraud**, in contracts between husband and wife, 40, 110, 133, 134, 213, 405; when, can be set up against third party, 84, 110, 134.

husband's agency, as a, 87.

retention of possession by husband as, 121.

of married women, 66, 423, 424; husband's liability for, 66; as estoppel, 270, 416, 418.

in law and in fact, 109.

as between parties, 110.

as against third parties, 111.

badges of, 112.

inadequacy of consideration as, 106.

**Fraudulent conveyances.** See DEALINGS.

antenuptial, of husband to defeat wife's rights, 268.

postnuptial, of husband to defeat wife's rights, 301, 314.

dower in land passing by, 252.

between husband and wife, 99-134.

**Fraudulent representations**, as contracts, 415, 416.

as estoppels, 416.

as torts, 424.

**Full age**, defined, 339.

**Furniture**, husband's rights in wife's, 14, 59, 60.

**Garnishee**, husband as wife's, 53.

wife as husband's, 87.

husband made, by wife, 54, 65.

**General statutes**, defined, 12.

whether apply to married women, 12, 13, 43, 50, 56, 345, 369, 471, 481.

**Gift**, defined, 224; between husband and wife, 42, 104, 107, 116, 119, 120, 125, 127, 128, 129, 164, 178, 198, 314.

when presumed between husband and wife, 42, 65, 127, 129, 132, 209.

necessity of delivery, 120, 127.

**Gift** — *Continued.*

- of labor, §§ 65, 87, 130.
- causa mortis*, 127, 350.
- property acquired by, 224.

**Grant.** See DEEDS, CONVEYANCES, etc.

- defined, 223, 224.
- property acquired by, 224.

**Grantor and grantees**, marriage of, 44.**Gross sum**, dower assigned in, 294.**Guarantor.** See SURETY.**Guardian**, of wife cannot release dower, 271.

- wife may join with, of husband, 271.
- married woman as, 487.
- of husband cannot reduce to possession, 177.

**Habeas corpus**, wife's right to writ of, 48, 62.

- husband's right to writ of, for wife, 62.

**Harboring**, action for, spouse, 78.**Head of family**, husband as, 14, 60.

- wife as, 60, 90 ; as husband's agent, 94.

**Heir**, husband's rights as, vest when, 22.

- wife's rights as, vest when, 22, 244.

**Heir-looms**, wife's rights in, 186.**Helpmeet**, wife as husband's, 14, 64, 65.**Hereditaments**, dower in, 253.**Hindering creditors.** See FRAUDULENT CONVEYANCES.**Home**, as matrimonial domicile, 29.

- husband's right to fix, 29, 60 ; to change, 29.
- spouse's equal right to enter family, 14, 59.
- wife bound to care for, 65.
- wife as agent in, 94.

**Home and foreign law**, effect of, discussed, 24-37.**Homestead**, discussed, 320-330.**Honor**, conjugal duty of, 58.**House.** See HOME.**Houshold arrangements**, husband's control of, 60.

- wife's control of, 90.
- wife as general agent in, 94.

**Housekeeper**, wife as, 94.**Husband.** See *various titles.*

- defined, 1.
- conjugal rights of, 14, 57-81 ; enumerated and defined, 57 ; to love, honor, etc., 58 ; to cohabitation, 59 ; to sexual intercourse, 59 ; to fix and regulate the family home, 60 ; to give the family name, 61 ; to personal custody and restraint of wife, 62 ; to

**Husband — Continued.**

personally chastise wife, § 63; to wife's services, 65; to sue for injuries to wife, 76; to sue for enticing or harboring wife, 77; to sue for *crim. con.* with wife, 79; to represent wife as agent, 84. conjugal duties of, 57-81; to cohabit with wife, 59, 60; to support wife, 64, 74, 81; to treat wife kindly, 58. conjugal liabilities of, for wife's contracts, 67, 81; torts, 66; crimes, 68.

property rights of, 70, 135-183; generally, 135-139; in his own property, 140; in his wife's realty, 141-162; in his wife's personalty, 163-183; in equitable separate property, 212; in statutory separate property, 243; in community property, 315; in homestead, 328; in wife's trade, 469-478.

suing rights of, generally, 439, 449, 460-463; on wife's contracts, 183; torts, 76-79.

rights and liabilities of, how far vested, 22; depend on what law, 24-33.

as trustee of wife, 202.

as agent of wife, 84-88.

**Husband and wife, relation of, defined, 1, 2; discussed, 38-134.**

unity of, defined, 38-39, 41, 43, 48, 304; as to contracts, 40-46; torts, 47-49; crimes, 47-49; wills, 50, 51; suits, 52-56; agency, 84-93; mutual dealings, 99-137; possession, 118 *a*-121; realty, 304-309; personalty, 311.

estates of, defined, 3; entireties, 304-309; joint and common, 310; in personalty, 311.

mutual rights and obligations of, 57-81.

**Identity, of husband and wife, 38, 82, 119.**

**Immovables, *lex sitæ* governs, 27, 33.**

whether property is immovable, how determined, 31, 33.

marriage contract as to, 27.

**Impeachment, of married woman's deed, 405.**

**Implied, promise of husband to restore fund to wife, 42.**  
contract between husband and wife for services, 65, 87.

gift from husband to wife, 42, 127 • wife to husband, 42, 65, 127, 129, 132, 209.

suretyship, 134.

**Implied contracts of married women, discussed, 375, 381.**



- Implied powers of married women**, in equity, §§ 203-208.  
     under statutes, 234; liberal interpretation, 16, 134, 231, 371,  
     from ownership, 205, 206, 234, 236, 372.  
     to contract as to separate property, 206, 234, 371, 372.  
     to act as trader, 475.
- Impotence**, cause of nullity, 59.  
     no bar to dower, 249.
- Improvements**, on wife's property are wife's, 88, 147.  
     wife's contracts for, 239, 372, 373, 387.  
     by one spouse of other spouse's property, 131.  
     dower in, 295.
- In any manner**, property acquired in, defined, 222.
- In law and in fact**, agency, 82, 84, 89.  
     fraud, 109, 113, 121.  
     seisin, 155, 252.
- In lieu of dower**. See **JOINTURE**, **ELECTION**.  
     devise, discussed, 274.
- In pais**, estoppel, defined, 413.
- In personam and in rem**, contracts of married women,  
     206, 379.  
     remedies against married women, 211, 372, 379.
- Incapacity**, of husband through marriage, 43.  
     of wife, 38, 331-487.
- Inchoate dower**, discussed, 246, 262.
- Incidental powers**. See **IMPLIED POWERS**.
- Income**, rights over, may differ from rights over principal, 205, 236, 372.
- Incorporator**, married woman as, 481.
- Incorporeal property**. See **CHoses IN ACTION**.  
     seisin in, 252.  
     as *choses in action*, 171, 173.
- Increase of wife's property**, right to, vested, 22.  
     is separate property, 119, 209, 227; though the result  
         of husband's time and labor, 87.  
     of equitable separate property, 209.  
     of statutory separate property, 227.  
     of business, 87, 464, 468, 469, 475.  
     under community system, 314.  
     as earnings, 65.
- Indorsement**, of note by husband as reduction, 181.  
     validity of, by married woman, 44, 91, 181, 385.
- Industry**. See **EARNINGS**.
- Infancy**, effect of wife's, generally, 339.  
     effect of husband's, generally, 335.

**Infancy** — *Continued.*

full age defined,  $\frac{2}{3}$  339.

and coverture combining, 339.

**Infant**, custody of, wife, 62.

support of, wife, 64.

duty to support of, husband, 64.

dower of, wife, 259; release of, 271.

husband's joint deed with wife, 335, 339.

wife's joint deed with husband, 339.

status of, wife, 339.

**Initiate** curtesy, discussed, 151, 156, 158.**Injuries.** See **TORTS.****Injunction**, by wife against husband, 48.**Insane**, wife cannot release dower, 271.

cannot consent, 213, 339.

wife's rights when husband is, 90, 335; as head of family, 60; to put husband in asylum, 90.

guardian of, husband, cannot reduce to possession, 177; may join in deed with wife, 271.

husband not liable for acts of, wife, 66.

**Insanity and coverture**, effect of combination, 339.**Insolvency.** See **BANKRUPTCY.**

laws as to, affecting married women, 13, 369.

of husband, wife's claim against estate, 53.

**Intended domicile**, defined, 28, 29.**Intention**, as to gifts, 127.

to exclude husband's rights, how shown, 199, 200.

**Intercourse**, conjugal right of, 59.**Interests**, of husband and wife the same, 39, 56.**Investment**, by husband for wife, 42.

by wife with husband's money, 65.

of joint funds of husband and wife, 129, 311.

of separate property, 119, 209, 227.

**Issue**, birth of, necessary to curtesy, 154; not to dower, 249.**Jewels**, as paraphernalia, 186.**Joinder of husband**, cannot be compelled, 368, 399.

cannot be delegated, 399.

in wife's contracts, 206, 212, 302.

in wife's torts, 66.

in wife's deeds, 205, 212, 399.

in wife's wills, 348.

in wife's trade, 87, 469.

in wife's estoppels, 409.

when husband is infant, 335.

when wife is infant, 339.

- Joinder of wife**, cannot be compelled,  $\frac{2}{3}$  407.  
cannot be delegated, 406.  
in deed of husband's property, 270-271.
- Joint**, acquisition by husband and wife, 231.  
contracts by husband and wife, 382.  
deed by husband and wife, 43, 205, 271, 399; binding  
on husband though void as to wife, 408.  
deed to husband and wife, 304.  
deposit by husband and wife, 128.  
estoppel against husband and wife, 409.  
investments by husband and wife, 129, 311.  
property of husband and wife, 302-311.  
service against husband and wife, 452.  
suits of husband and wife, 439; against husband  
and wife, 449.  
tenancy of husband and wife, 307, 310, 313; mar-  
riage of joint tenants, 302, 310.  
tenancy, curtesy in, 155, 157; dower in, 254; hus-  
band may disserve wife's, in leasehold, 145; stat-  
utes as to, how affect entireties, 307.
- Jointure**, discussed, 126, 273, 274.
- Judgment**, confessed by husband in favor of wife, 53.  
against married women, 411, 457, 458; as estoppel,  
411.  
by husband on wife's *chose in action* as reduction,  
180.
- Jure uxoris**, husband's suit, 76, 77.  
husband's estate, 146-150.
- Jurisdiction**. See EQUITY, etc.
- Jus disponendi**, as an incident of ownership, 205, 206, 236,  
372.  
distinguished from *jus tenendi*, 236, 372.
- Keeping house**, position of wife when, 94.
- Labor**. See EARNINGS.  
gifts between husband and wife of, 65, 87, 130.
- Laches**, as to claim of dower, 277.  
as limitations, 277, 339, 365.
- Lands**. See REALTY.
- Lapsed legacy**, to wife, husband's rights in, 225.
- Larceny**, between husband and wife, 14, 47, 48.
- Law**. See IN LAW AND IN FACT.  
common, 6.  
civil, 7.  
equity, 8.  
statutes, 9.

**Law**—*Continued.*

of husband and wife, defined, §§ 1-5; sources of, 6-10; interpretation of, 11-18.

international, 24-37.

home and foreign, 24-37.

past and present, 19-23.

*lex domicilii*, 30, 31; *rei sitæ*, 33; *loci actus*, 34; *fori*, 35.

**Lease**, by married woman, void at common law, 147, 387; when valid, 234, 239, 372; is a "disposition" of property, 233.

to married woman, is a purchase by her, 387; property acquired by "grant," 224.

by husband of wife's property, 145.

**Leasehold estates**, husband's rights in wife's, 145.

entireties in, 303.

**Legacy**, husband's right in wife's, 174; lapsed, 225.

property acquired by, 225.

is a *chose in action*, 169.

**Legitimate children**, result from marriage, 1.

legislature may, 23.

are so by law of domicile, 30.

**Letters.** See ADMINISTRATION, POWERS.

**Liberal**, interpretation of statutes, 12, 16.

**Lien**, of vendor as against dower, 259.

of vendor not forfeited by acceptance of married woman's note, 385.

**Life estates**, husband's rights in wife's, 144.

curtesy in, 155.

dower in, 254.

**Limitations**, plea of, by married women, 456; against married women, 445; between husband and wife, 55 *a*; after husband's death, 147.

in favor of husband and wife, 66, 67, 339, 365, 456.

as to curtesy, 159.

as to dower, 277.

how wife's act affects running of, 91, 368, 381.

debt barred by, as consideration, 105.

**Liquor seller**, liability of, under civil damage acts, 80.

**Local law**, discussed, 24-37.

all statutes presumed, 12, 18, 275, 308, 321.

**Lock up**, husband's right to, wife, 48, 62.

**Love**, marriage right to, 58.

as a consideration, 105.

**Lunacy.** See INSANE.

**Maintenance**, suits for, 74.

**Majority.** See INFANT.

**Management**, by married women of separate property,  
 §§ 203, 233.

by husband of wife's property, 87, 119; suits, 66, 67,  
 91, 460.

of married women's suits, 460, 461.

of household, 60, 94.

**Maner**, dower in a, 253.

**Mansion house**, dower in, 291.

**Manslaughter**, wife's death from husband's neglect as,  
 64; beating, 63.

killing by husband of wife's paramour, 59.

**Marital rights.** See CONJUGAL RIGHTS.

**Market**, dower in, 253.

**Marriage**, defined, 1.

essential to suit for *crim. con.*, 79; curtesy, 253;  
 dower, 250.

effect of, of contracting parties, 44.

effect of, on wills, 352.

unity growing out of, 38, 39.

rights and obligations growing out of, 57-81.

agency growing out of, 82-98.

estates growing out of, 135-330.

incapacity of husband growing out of, 43.

incapacity of wife growing out of, 331-487.

**Marriage settlements**, discussed, 99-134.

as creating separate property, 198.

effect of, on conflict of laws, 27, 28, 33.

**Married woman.** See FEMME COVERT, WIFE.

**Married women's separate property acts**, described, 218.

construction of, generally, 12, 15, 370-372.

effect of, on personal status, 12, 15, 48; contracts  
 between husband and wife, 43; torts between  
 husband and wife, 48, 49; suits between husband  
 and wife, 54; wife's right to support, 64; earnings,  
 65; husband's liability for wife's contracts, 67;  
 torts, 66; crimes, 68; on equitable separate prop-  
 erty, 197, 216; on equity of settlement, 190; on  
 entireties, 306, 308; curtesy, 161; wife's surety-  
 ship, 134, 391; wife's personal contracts, 370-373,  
 470; wife's capacity to trade, 470.

estate created by, discussed, 217-243.

**Matrimonial**, domicile defined, 29.

suits defined, 48, 52.

rights and obligations, 57-81.

H. & W. — 62.

- Mechanic's lien**, wife's lands, when liable, § 242.  
     placed by husband on wife's lands, 85, 131, 306.
- Merchandise**, wife's rights over, 233, 236, 372, 475.
- Merger**, of wife in husband by marriage, 33.  
     of curtesy initiate, 158.
- Mesne profits**, dower in, 297.
- Metes and bounds**, dower assigned by, 292.
- Mill**, dower in, 253.  
     wife running a, 465.
- Mines**, dower in, 253, 292.
- Mingling**, of property of husband and wife, 65, 118 *a*-121,  
     129, 310, 311.
- Mining interest**, is "property," 219.
- Minor**. See **INFANT**.
- Misappropriation**, of money by married women, 66, 381,  
     483.
- Mistake**, power of legislature to correct, 23.  
     reforming, etc., married woman's, in equity, 123,  
     205, 236, 270, 272, 359, 368, 376, 404.
- Money**, rights of husband and wife in wife's, 166, 167,  
     169, 170, 172, 219.  
     is "property," 219; whether note is contract as to  
     property, 373.
- Mortgage**, power to, included in power to convey, 154,  
     372.  
     restraint on power to, 204.  
     to secure invalid debt, 363.  
     for husband's debt, 134.  
     foreclosure of married woman's, under general law,  
     13.  
     marriage of parties to a, 44.  
     priorities as between, and dower, 260.  
     of married woman, generally, 134, 223, 236.
- Movables**, rights in, depend on *lex domicilii*, 27, 31.  
     whether property is, 31, 33.  
     effect of marriage contract on, 27.
- Mutual wills**, between husband and wife, 349.
- "My wife,"** in case of several wives, 51.
- Name**, family, right of wife to, 61.  
     woman bearing man's, not necessarily his agent,  
     97.
- Naming**, of certain powers a denial of others, 12, 16, 43,  
     204, 220, 374.
- Necessaries**, suit for, 81.  
     agency of wife for, 90, 94, 95.

- Next friend**, suit by wife through, §§ 53, 192, 440, 461  
suit against wife through, 450.  
liable for costs, 437, 463.
- Next of kin**, rights of husband and wife as, 22.
- Nominal**, consideration, 105.  
party, husband, when a, 429, 439, 449.
- Notes**, of married women, validity of, 223, 375, 385;  
husband's rights in, 173; confirmed after dis-  
coverture, 366; discussed, 385.  
to husband, 41, 42.  
of husband to wife, 41, 42; antenuptial, 44, 55.  
to husband and wife, 132, 136, 311.  
by husband as agent for wife, 85.  
by wife as agent for husband, 89; accommodation,  
92; in business, 93; how made, 93.  
invalid, secured by mortgage, 368.
- Notice**, to husband when, to wife, 85.  
invalid deed no, 368.
- Nuisance**, liability for, on married woman's property,  
243.
- Obedience**, conjugal duty of, 58, 60, 62.
- Obligation of contracts**, acts impairing, 21.
- Obligor and obligee**. See BOND, COVENANT, etc.  
marriage of, 44.
- One person**, husband and wife as, 33, 39, 303.
- Oral settlement**, discussed, 199, 224.
- Ornaments**, ownership of wives', 120, 127, 186.
- Ownership**, presumed from possession, 86, 88, 118 *a*, 119.  
incidents of, 203, 205, 234, 272.
- Paraphernal property**, under civil law, 186.
- Paraphernalia**, wife's, discussed, 186, 187.
- Parent and child**, relation of, defined, 5.  
law of domicile as to, 30.  
right of parent to harbor child, 78; to control, 60;  
to chastise, 30.  
obligation of parent to child, 65, 71.
- Parol gifts**, between husband and wife, 120, 121, 127.
- Participation of husband**. See JOINDER.
- Parties**. See SUITS.  
two, necessary to every contract, 40.
- Partition**, wife's suit against husband for, 53.  
wife's interest in case of, of husband's property,  
133, 172.
- Partner**, married woman's capacity to be, 480.  
wife as, of husband, 87, 480; community, 320.

**Partner** — *Continued.*

husband cannot make wife, § 85.

lands of, are personalty, 136.

dower in lands of, 254, 257.

**Past law.** See RETROSPECTIVE LAWS.

effect of, discussed, 19-23.

**Payment**, receipt of, as reduction to possession, 179.**Pending suits**, effect of marriage on, 430.

effect of dissolution of marriage in, 434.

**Perpetuities**, rule against, 204.**Person**, husband and wife as one, 38, 39, 303.**Personal**, and property marriage rights distinguished, 22, 27, 28, 29.

rights are "property," 219; when vested, 22.

rights growing out of marriage, 57-81.

and property obligations of married women distinguished, 42, 211, 372, 379.

contracts of married women, 237, 239, 379.

injuries to wife, right of action for, 75-79, 219, 222, 230.

property of husband, his rights in, 140; wife's rights in, 301.

property of wife, husband's rights in, 163-183; her rights in, 162, 184-243.

property of both husband and wife, 311.

property, "estate" in, 135; conversion from realty, 136.

services of wife, 65.

custody and restraint of wife, 62.

chastisement of wife, 63.

**Piano**, purchase of, by married woman, 223.

is "household furniture," 219.

**Pin-money**, discussed, 188, 189.**Piscary**, dower in, 253.**Possession**, as evidence of title, 86, 119; follows title, 88, 119.

effect of joint, of husband and wife, 118 a-121;

presumption of ownership, 119, 127; change

of, as delivery, 120; retention of, as fraud, 121.

wife's personalty in, discussed, 166-170; of wife,

167; of husband, 168; of third party, 169.

reduction to, discussed, 177-183.

as seisin, 155, 247.

**Possibilities**, husband's rights in wife's, 175.



- Postnuptial**, dealings between husband and wife, generally, §§ 99-134; contracts, 40-46; torts, 47, 48; crimes, 47, 49; wills, 50, 51, 349; suits, 52-56.  
contract as to dower, 266, 267.
- Power**, private and statutory distinguished, 205, 206, 376.  
of wife over equitable separate estate, 203; statutory, 233, 372.  
wife's execution of, 203, 205; in favor of husband, 203.  
wife's deed as an execution of a, 23, 372, 376, 404, 407.  
deeds under, 205, 376, 407.  
wills under, 50, 342.
- Power of attorney**, of married women discussed, 403; as to dower, 271.  
of husband to wife, 89.
- Practice**. See **SUITS**.
- Preference**, by husband of wife, 45.
- Premiums**. See **INSURANCE**.
- Presence of husband**, coercion presumed from, 66, 68, 121, 417, 419.  
torts by married women in, 66.  
crimes by married women in, 68.  
wife's silence in, as an estoppel, 121, 213, 417, 419.
- Presumptions**, of gift between husband and wife, 42, 65, 127, 199.  
of agency of wife, 93.  
of title from possession, 86, 88, 118 *a*, 119.  
of married woman's incapacity, 357.  
of fraud in law, 107.  
of intent to charge separate property, 206, 235, 238, 373.
- Pretended agency**, of husband for wife as fraud, 87.
- Prima facie**, disability of married women, 357.  
evidence of certificate to deed, 401.
- Priorities**, as between dower and other encumbrances, 258.
- Private instructions**, to agent are of no effect, 84, 90, 94, 98.
- Private powers**, distinguished from statutory, 205, 206, 376.
- Privy examination**, of married women, 205, 399, 400.
- Procedure**. See **SUITS**.  
rights and remedies, 429; tort between husband and wife not a question of, 48.

**Procedure**—*Continued.*

statutes relating to, §§ 20, 436.

rights of, not vested, 22.

depend on the law of the forum, 35, 37, 435; enforcing of contracts, 144.

after death of husband or wife, 44.

**Proceeding in rem**, discussed, 211, 372, 379.

**Proceeds of married women's suits**, ownership of, 447.

**Process**, against married women, 211, 452.

**Product**. See EARNINGS, INCREASE.

**Profits**, of equitable separate property, 209.

of statutory separate property, 227.

of business, 87, 465, 468, 470, 475.

**Prohibition**, by husband to wife against acting as his agent, 89, 90, 94, 98.

**Promises**. See CONTRACTS.

**Promissory notes**. See NOTES.

**Proof**. See EVIDENCE, PRESUMPTION, WITNESS.

of foreign law, 25.

of agency, 86, 97.

of consideration, 108.

of title to separate property, 119, 232.

burden of, on wife to show ownership, 119, 132, 232;  
on party setting up capacity of married woman,  
237, 357.

**Property**. See ESTATES, etc.

defined, 44, 65, 87, 219, 222, 229, 230; chose in action,  
44; ability to earn, 65; talents, 87.

what, liable in execution, 66, 67, 458.

rights and personal rights distinguished, 27, 28, 42,  
211, 379.

**Property acts**. See MARRIED WOMEN'S PROPERTY.

**Prospective**, statutes presumed, 17, 20, 65, 67, 268, 308, 378.

**Public policy**, as to contract between husband and wife,  
40.

as to testimony between husband and wife, 36.

as to unity of husband and wife, 12, 14, 43.

as to mutual confidence between husband and wife,  
119.

**Public use**, dedication to, as bar to dower, 278.

**Purchase**, married women's capacity to, 223, 373, 383.

property acquired by, 223.

joint, of husband and wife, 132.

**Purchase money**, lien for, prior to dower, 259.

wife's liability for, 223, 383.

**Purchase money** — *Continued.*

wife's estoppel by receipt of, §§ 405, 410, 412, 415.  
whether wife must restore, 368, 383.

**Pure torts**, wife's liability for her, 66, 423, 424; husband's, 66.

wife estopped by her, 418.

**Quarantine**, widow's, 290.**Quit-claim deed**, presumed without consideration, 108.

wife's deed as a, 384, 412.

**Rape**, testimony of wife in action for, 56.**Ratification**, of wife's agency by husband, 84.

of husband's agency by wife, 89, 93, 94.

of contracts by married women, 366, 368.

of deeds by married women, 23, 270-272, 339, 402-404.

of deed by infant, 339.

**Realty**, estates in, 135, 136.

converted into personalty, 136.

improvements on, 131.

*lex rei sitæ* applies to, 33.

husband's estates in wife's, 141-162.

wife's estates in husband's, 244-300.

estates of husband and wife in, 302-310.

**Reasonable provision**, by husband for wife in settlement  
valid against creditors, 116.

by equity out of wife's *choses in action*, 190-196.

**Receipt**, of husband for wife, 82, 84, 85, 179, 212; validity  
of, depends on what law, 33.

of wife for husband, 89, 91.

of married woman, 179, 386.

by husband as reduction, 179.

**Record**, estoppel by, 411, 457.**Recording**, of gift, 120, 121.

of marriage settlement, 102; transfer between husband and wife, 120, 121.

schedule of separate property, 121, 232.

of declaration of intent to trade, 472.

of homestead claim, 325.

**Rectifying**, deed of married woman in equity, 123, 205,  
236, 270, 272, 376, 404.

by statute, 23, 403.

**Redemption**, of mortgage, effect of, on dower, 261.**Reduction to possession**, by husband of wife's *choses in action*, 177-183; a personal right, 177; the intent and the act, 178; payment, etc., 179; substitution, 180; assignment, 181; release, 179; suit, 180.

**Reforming.** See RECTIFYING.

**Relation.** See HUSBAND AND WIFE, PARENT AND CHILD.

**"Relating to,"** contracts, property, what are, §§ 239, 373.

**Release,** of dower, 271-273; as a consideration, 105.

of mortgage by marriage, 44.

of mortgage, effect on dower, 261.

of antenuptial debts by marriage, 44; torts, 48.

by husband as a reduction, 179.

husband's, for wife, 82, 182, 212.

of married woman, 386.

**Remainders,** husband's rights in wife's, 175.

curtesy in, 157.

dower in, 251.

**Remedies.** See SUITS.

statute giving new, does not destroy old, 12, 54.

and rights distinguished, 237, 429.

right to, not vested, 20, 22, 436.

depend on law of forum, 31, 35, 435.

*in personam* and *in rem*, 211, 372, 379.

as to equitable separate property, 210, 211.

as to statutory separate property, 241, 242.

as to fraudulent conveyances, 122-124.

after discovery, 55, 366.

**Renouncing will.** See ELECTION.

**Rent.** See LEASE.

husband collecting wife's, 84, 410.

wife collecting husband's, 89.

ownership of, of wife's property at common law, 146; equitable separate, 209; statutory separate, 227.

wife's liability for, 387; implied, 381, 387.

assignment of dower in, 293.

**Requisites,** of dower, 249.

of curtesy, 152.

**Repairs,** by husband of wife's property, 85.

wife's contracts for, 234, 371, 372.

wife's liability for, 387.

**Replevin,** by wife against husband, 54.

estopping married women, 416.

**Representative capacity,** married women in, 482-487;

questions involved, 482; general rules, 483; as

agent, 84, 363, 469, 479, 484; as trustee, 132, 485; as

executrix or administratrix, 486; as guardian,

487.

- Republication**, of married women's wills,  $\frac{2}{2}$  353.
- Res adjudicata**, suit in wife's right as, in suit on husband's right, 77; judgment against married women as, 411, 457.
- Residence**. See **HOME**.  
not necessary for dower, 249.
- Restitution**, of conjugal rights, 72.
- Restraint**, on alienation discussed, 204.  
of wife by husband, 62.
- Resulting trusts**, between husband and wife, 129, 132.
- Retention of possession**, by husband as fraud, 121.
- Retroactive laws**, defined, 19.
- Retrospective laws**, discussed, 19-23.  
defined, 19.  
as to curtesy, 22, 162.  
as to contracts, 22, 378.  
curative acts, 23, 376, 403.
- Reversions**, dower in, 254.  
married women's power over, 205, 206, 236, 372.
- Revocation**, of deed by married woman, 270.  
of gift from husband to wife, 123, 127, 469.  
of will by marriage, 51, 351.  
of husband's agency by wife, 84.  
of wife's agency by husband, 94, 98.  
of agency by death, 84, 98, 127.
- Rights**. See **PERSONAL, PROPERTY, ESTATES**, etc.  
and remedies distinguished, 237, 429.  
valuable and vested, 20, 22.  
personal and property, 22, 27, 28, 29.  
governed by what law, 24-37.  
conjugal, 57-81.  
in action, 171.  
suits in different, 77.  
general effect of marriage on personal, 38, 39, 331; property, 137.
- Rules**, for the construction of statutes, 11-18.  
no general statute affects law of husband and wife, 12, 13, 50, 56, 345, 369, 481.  
married women acts do not affect *relation* of husband and wife, 12, 14, 43, 48, 54, 367, 375.  
property acts do not affect personal status, 12, 15, 48, 233, 237, 308, 370, 372, 470.  
statute denying certain powers may impliedly give all others, 43, 56, 374.

**Rules — Continued.**

- statute enumerating certain powers may impliedly deny all others, §§ 12, 16, 43, 204, 220, 236, 345, 371, 373, 374.
- some statutes must be strictly construed, 12, 16, 43, 345, 374, 376.
- some statutes must be liberally construed, 12, 16.
- statutes must be construed prospectively, 12, 17, 20, 162, 165, 268, 308, 321, 339.
- statutes must be construed locally, 12, 18, 275, 308, 321.
- as to contracts of married women, 369-378.
- as to contracts charging equitable separate estate, 206.
- as to estoppels against married women, 410.
- as to conflict of laws, 27.
- Sales**, of married women, 233, 383.
  - by husband trustee to wife, 37.
  - by wife executrix to husband, 486.
- Savings**. See EARNINGS.
  - of married women, 65, 87, 209, 227.
- Scire facias**, writ of, by wife against husband, 53.
- Scope of authority**, of agency of husband, 85.
  - of agency of wife, 92, 94.
- Seal**, effect of married woman's, 384, 386, 406, 412.
- Secret instructions**, to agent, 84, 90, 94.
- Security**, wife contracting as, 134, 391.
- Seduction**. See ENTICEMENT, CRIM. CON.
- Seisin**, in law and in fact, 155, 252.
  - for dower, 252.
  - for curtesy, 147.
  - for husband's estate *jure uxoris*, 147.
- Sell**, married women's agreement to, 372, 373, 383.
  - married woman's power to, 205, 236, 376, 397, 398.
- "Separate,"** defined, 65, 465, 480.
- Separate acknowledgment**, of married women, 400, 401.
- Separate property of married women**, is of two kinds, which may exist side by side, 216, 217; which is created, depends on wording of deed, 199, 224; or on mode of acquisition, 199, 220-231; or wife may elect, 216.
  - equitable, discussed, 197-217.
  - statutory, discussed, 217-243.
  - dower is not, 266, 267, 270, 396.
  - under community system, 314.

- Separation**, deeds of, § 40.  
a breach of marriage right, 59.
- Services.** See EARNINGS.  
husband's right to wife's, 65, 78.  
husband's, given to wife, 87.
- Set-off**, in suits by husband and wife, 65, 443, 454.
- Settlements**, marriage, discussed, 40, 99-134.
- Sexual intercourse**, conjugal right to, 59.
- Sewing machine**, purchase of, by married woman, 219, 223.
- Shars.** See STOCK.
- Sickness of husband**, wife's agency during, 90, 335.
- Signature**, wife bound by her, 405.
- Silence**, of married woman as an estoppel, 120, 121, 213, 410, 417; creates husband agent, when, 84, 121, 213, 410.
- Skill.** See EARNINGS.
- Slander**, between husband and wife, 48.  
by husband and wife, 66.  
against wife, 77.
- Sleeping together**, conjugal duty of, 59.
- Society**, conjugal right to spouse's, 59, 78, 79.
- Sole and separate property.** See EQUITABLE SEPARATE PROPERTY.  
defined, 197.
- Sources**, of law of husband and wife, 6-10.  
of equitable separate property, 198.  
of statutory separate property, 220-231.
- Special occupant**, husband as, 144.
- Special proceedings**, by married women, 446.  
against married women, 211, 459.
- Specific performance**, for wife of agreement for settlement, 123.  
against wife of agreement to deed, 407.
- Station in life**, scope of wife's authority depends on, 94.
- Status**, the marriage, defined, 1.  
of married women, defined, 4; discussed, 38, 39, 331-482.  
of husband and wife, 38-134.  
depends on law of domicile, 30.  
not a vested right, 22.  
not controllable by contract, 28, 67, 382.  
not affected by property acts, 12, 15, 48, 233, 237, 308, 370-372.

**Statutes.** See RULES.

as basis of law of husband and wife, § 9.

interpretation of, 11-18.

past and present, 19-23.

home and foreign, 24-37.

of fraud, 114.

creating separate property, 217-243.

**Statutory separate property of married women**, defined,  
217; may exist side by side with equitable, 216,  
217; dower is not, 267, 270.

the statutes described, 218.

"property" defined, 219.

"separate" defined, 65, 129, 465

sources of, 220-231; owned at time of marriage, 221  
acquired "in any manner," 222; by purchase  
223; by gift or grant, 224; by devise, descent,  
etc., 225; by exchange, 226; by increase, 227; by  
services or trade, 65, 228, 470, 475; by contract,  
229; by tort, 230; jointly with husband, 231.

incidents of, 232-243; necessity of inventory, etc.,  
232; wife's power and control over, 233; powers  
incidental to ownership, 234, 239, 372; jurisdic-  
tion of equity over, 235; trustee of, 235; wife's  
deed, etc., of, 236, 398; wife's wills of, 240, 346;  
wife's contracts concerning, 237, 370; in equity,  
238, 371; at law, 239, 372; remedies respecting,  
241; liabilities of, 242; rights of husband in, 243;  
rights of husband's creditors against, 243.

**Statutory powers**, discussed, 405, 406, 407.**Stealing**, from wife is from husband, 167.

between husband and wife, 47, 49.

**Steward**, wife as husband's, 94.**Stock**, is a *chose in action*, 171.

is immovable property, 33.

whether is realty, 253.

husband's rights in wife's, 173.

husband's liabilities on wife's, 176.

husband's transfer of wife's, 130.

wife as holder of, 390, 481.

dower in, 253.

**Stockholder**, married woman as, 390, 481.**Stolen goods**, husband's liability for wife's receipt of,  
66.**Sub potestate viri**, wife is, 60.**Subpœna.** See PROCESS.



**Subsequent acquisitions**, effect of settlement on, §§ 27, 28, 31.  
law of domicile as to, 27, 28, 31.

**Subsequent creditors**, rights of, 117.

**Suits**, matrimonial, 48.

of divorce, 73.

for restitution of conjugal rights, 72.

for maintenance, 74.

of suppliant, 75.

for dower, 286-288.

of husband in which wife is joined, 76.

of wife in which husband is joined, 76, 439, 449.

reduction to possession by, 183.

of foreclosure barring dower, 261.

affecting dower, 261, 280.

between husband and wife, 52-56, 433; generally, 52,

433; under unwritten law, 53; under statutes, 54;

after dissolution of marriage, 55; defenses, 55 *a*.

of married women, generally, 428-437; rights and

remedies, 429; effect of marriage on pending,

430; at common law, 431; in equity and by statute,

432; effect of dissolution of marriage on

pending, 434; law of forum governs remedies,

34, 35, 435; law of time of suit brought governs

remedies, 20, 436; costs, 437.

by married women, generally, 438-447; modes in

which married women may sue, 438; jointly with

husband, 439; by next friend or trustee, 440;

alone, 441; the causes of action, 442; the defenses,

443; plea of coverture, 444; plea of limitations,

445; special proceedings, 446; ownership of pro-

ceeds, 447

against married women, generally, 448-459; modes

in which married women may be sued, 448;

jointly with husband, 449; with trustee or next

friend, 450; alone, 457; the service of process,

452; the cause of action, 453; the defenses, 454;

plea of coverture, 455; plea of limitations, 456;

effect of judgment, 411, 457; the execution of

judgment, 458; special proceedings, 211, 459.

management of married women's, by husband, 66,

360; by wife, 461.

attorney in married women's employment, 462;

compensation, 463.

**Summons**. See PROCESS.

**Suppliant**, suit of, 75.

H. & W.—63.

- Support**, wife's right of,  $\frac{2}{3}$  64.  
 of family, 64, 381, 387.
- Suretyship**, of wife for husband, 134.  
 of married women generally, 134, 373, 375, 391.  
 for wife, bound though wife is not, 368, 486.
- Survivorship**, of husband and wife, as to personalty, 311 ;  
 as to *choses in action*, 77, 176, 311 ; as to realty, 306.  
 rights of, depends on law at time of death, 20, 31.
- Talents**. See EARNINGS.  
 not property, 87.  
 husband may give wife his, 87.  
 result of wife as earnings, 465.
- Technical words**, not necessary to create separate estate,  
 199, 200.
- Tenancy**, joint and common of husband and wife, 302-311.
- Term of years**. See CHATTELS REAL, LEASEHOLDS.
- Testamentary law**. See WILLS.
- Testify**. See EVIDENCE.  
 husband and wife's capacity to, 56.
- Thirds**, widows', discussed, 140, 266, 351.
- Title**, follows possession, 118 *a*, 119.  
 proof of wife's, 119, 132, 232.
- Torts**, between husband and wife, 47-49.  
 liability of husband for wife, 14, 63.  
 right of husband for, to wife, 77.  
 of married women, 66, 421-425 ; general considera-  
 tion, 421 ; antenuptial, 66, 422 ; postnuptial, 66,  
 423 ; connected with contract, 66, 91, 416, 424 ;  
 liability for, how enforced, 66, 425.  
 married women estopped by, when, 416, 418, 424.  
 property acquired by, 230.
- Trade**, of married women, 464-481 ; sources of capacity,  
 464, 465 ; earnings, 65, 87, 228, 464, 465 ; capacity  
 at common law, 466 ; by custom, 467 ; in equity,  
 468 ; with husband's consent, 469 ; under mar-  
 ried women's property acts, 470 ; under other  
 statutes, 471 ; filing declaration, etc., 472.
- Incidents of married women's capacity to**, 473-481 ;  
 how far dependent on sources of capacity, 473 ;  
 express powers, 474 ; implied powers, 16, 475 ;  
 contracts in, 392, 475 ; purchase in, 223, 475 ; rights  
 of wife's creditors, 476 ; rights of husband's  
 creditors, 477 ; rights and liabilities of husband,  
 478 ; as agent, 479 ; as incorporator, etc., 481 ; as  
 partner, 475, 480.

**Trade—Continued.**

ownership of property acquired in, §§ 65, 87, 209,  
228, 465, 468–470, 475, 478.

**Transfer.** See DEALING, DEED, DISPOSITION, etc.

**Trespass.** See TORTS.

husband against wife, 14.

wife against husband, 48.

for *crim. con.* 79.

**Trover**, husband against wife, 14, 54.

wife against husband, 48.

against husband and wife, 66.

**Trusts.** See EQUITABLE.

resulting, 132.

dower in, 252, 254, 256.

**Trustee**, of equitable separate property, 125, 202, 205,  
212.

of statutory separate property, 235.

transfer between husband and wife through, 41, 42,  
125.

suits of married women through, 53, 440; against,  
450.

wife may have husband removed, 53.

property held by husband as, not restored, 168.

married women acting as, 132, 485.

*cestui que trust*, husband and wife as, 110, 405.

**Undue influence.** See COERCION, FRAUD.

**User**, by husband of wife's property, 42, 118–121, 127.

**United States**, no jurisdiction over marriage relation, 9.

retrospective statutes under, constitution, 21.

citizenship conferred on wife by marriage, 39.

**Unity of husband and wife**, defined, 2, 38, 39, 40, 56.

a fiction of the common law, 6, 38, 39.

not destroyed by married women's acts, 12, 14,  
43.

effect of, on possession, 118 *a*, 119.

effect of, on joint holdings, 303.

**Valid, void, and voidable**, settlements distinguished, 100.

contract of married women, 368.

**Validity.** See CONTRACTS, DEEDS, etc.

**Valuable consideration**, defined, 104, 105.

**Valuable rights**, not necessarily vested, 20, 21.

**Vested rights**, what are, 22, 65, 67, 319.

statutes affecting, invalid, 21.

not affected by change of domicile, 32.

under settlements, 216.

**Vested rights**— *Continued.*

- in wife's personalty, § 165.
- in wife's realty, 149, 158, 162.
- in husband's realty, 262.
- in homestead, 321.

**Violence**, of husband towards wife, 48, 62, 63.

**Visitors**, husband decides who shall be, 60.

**Void**, contracts of married women not voidable but, 366, 368.

- improperly executed deeds of married women, 402-404.

**Voluntary conveyance.** See FRAUDULENT CONVEYANCE.  
effect of, 109.

**Wages.** See EARNINGS.

**Waiver**, of constitutional protection, 21.

- of homestead exemption, 321.
- of wife's disability to testify, 56.
- by husband of, agent to wife's earnings, 65.
- by husband of, wife's agent to distrain, 85.

**Warranty**, of married women, 384.

- inchoate dower comes within, for title, 232.

**Waste**, by husband on wife's lands, 147, 158.

- by doweress, 253, 264.

**Wearing apparel**, wife's, 186, 187.

**Wedding ring**, wife's right to, 187.

**Whipping wife**, by husband, 48, 63.

**Wife**, defined, 1; when several which is meant, 51.

- domicile of, 29.

- relationship of, towards her husband, 38-134; unity with husband, 38-56; conjugal rights, liabilities, disabilities, etc., 57-81; agency, 82-98; dealings, 99-134.

- estates of, in husband's realty, 244-300; personalty, 301; in her own equitable separate property, 197-216; statutory separate property, 217-243; community, 316; homestead, 329.

- status of, generally, 331-339; wills, 340-354; contracts, 355-393; deeds, 394-408; estoppel, 409-420; torts, 421-425; crimes, 426, 427; suits, 428-463; trade, 464-481; in representative capacities, 482-487.

**Wild lands**, dower in, 253.

- curtesy in, 155.

**Will**, of husband as to dower, 268, 274; thirds, 301; wife's chattels real, 145.

**Will**—*Continued.*

of wife,  $\frac{2}{3}$  50, 51, 340-354; at common law, generally, 341.

exception, 342; of pin money, 189; under powers, 342, 352; in equity, 343; of equitable separate property, 208, 344; under statutes, 13, 345; of statutory separate estate, 240, 346; validity and operation distinguished, 347; effect of, or curtesy, 161; effect of husband's consent, 348; gift *causa mortis*, 350; revocation of, 57, 351; effect of marriage on antenuptial, 57, 352; republication of, after discovery, 353; conflict of laws as to, 36, 354.

between husband and wife, 50, 51, 344, 345, 349.

“**With reference to,**” contracts, property defined, 239, 373.

**Witnesses.** See EVIDENCE.

husband and wife as, 56.

**Writing,** evidence contracting, 108, 119.

**Wrongs.** See TORTS.









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